(20,689.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 297.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR AND APPELLANT,

vs.

SAMUEL CALHOUN, BY ANNA CALHOUN, HIS NEXT FRIEND.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a In the Supreme Court of the Territory of Oklahoma.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error and Appellant,

vs.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error and Appellee.

Return to Writ of Error and Order Allowing Appeal.

In pursuance to the command of the writ of error issued out of the Supreme Court of the United States of America to the Supreme Court of the Territory of Oklahoma and filed in my office as Clerk of the Supreme Court of the Territory of Oklahoma, the first day of April, A. D. 1907, and in pursuance to the command of the order of the Supreme Court of the Territory of Oklahoma allowing an appeal from the Supreme Court of the Territory of Oklahoma to the Supreme Court of the United States of America, which said order was issued the first day of April, A. D. 1907, and filed in my office the first day of April, A. D. 1907.

I, Benjamin F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, herewith transmit a true and correct copy of the opinion and judgment of the Supreme Court of the Territory of Oklahoma, together with a true copy of all of the records and proceedings and all pleadings, papers and files in said cause filed and recorded in my office as Clerk of said court in the above entitled cause. And I also transit herewith a copy of assignment of errors and original writ of error and citation and proof of service thereof and a copy of the original order allowing an appeal in said cause lately pending in the Supreme Court of the Territory of Oklahoma, and also one of the copies of brief of the plaintiff-in-error, first originally filed in said cause on the 26th day of March, A. D. 1906, all under my hand and seal of said court.

b Witness my official signature and the seal of the said Supreme Court of the Territory of Oklahoma at the City of Guthrie in said Territory of Oklahoma this 11th day of April, in the Year of our Lord One Thousand Nine Hundred and Seven.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma,
By JESSIE PARDOE, *Deputy.*

c In the Supreme Court of the United States of America.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend,
Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Samuel Calhoun, by Anna Calhoun, his next friend, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington within thirty (30) days from the date of this writ, pursuant to an appeal duly allowed by the Supreme Court of the Territory of Oklahoma and filed in the clerk's office of said court on the 1st day of April, A. D. 1907, in a case wherein The Atchison, Topeka and Santa Fe Railway Company is appellant and you are appellee to show cause, if any, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America:

Witness, the Honorable John H. Burford, Chief Justice of the Supreme Court of the Territory of Oklahoma, this first day of April, A. D. 1907.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Service of a copy of the within citation is hereby admitted this 9th day of April, A. D. 1907.

SAMUEL CALHOUN,
By ANNA CALHOUN,
His Next Friend,
By H. H. HOWARD,
His Attorneys.

d [Endorsed:] In the Supreme Court of the United States of America. The Atchison, Topeka and Santa Fe Railway Company, Appellant, *vs.* Sam'l Calhoun, by Anna Calhoun, his next friend, Appellee. Citation on appeal. Filed April 11, 1907. Benj. F. Hegler, Clerk Supreme Court by Jessie Pardoe, Deputy. Henry E. Asp, Charles H. Woods, Geo. M. Green, Attorneys for Appellant.

c In the Supreme Court of the United States of America.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Samuel Calhoun, by Anna Calhoun, his next friend, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington within thirty (30) days from the date hereof pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Oklahoma wherein The Atchison, Topeka and Santa Fe Railway Company is plaintiff-in-error and you are the defendant-in-error to show cause, if any there be, why judgment rendered against the said plaintiff-in-error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America.

Witness The Honorable John H. Burford, Chief Justice of the Supreme Court of the Territory of Oklahoma, this first day of April, in the Year of our Lord One Thousand Nine Hundred and Seven.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

I hereby acknowledge service of the above and foregoing Citation this 9th day of April, A. D. 1907.

SAMUEL CALHOUN,
By ANNA CALHOUN, *His Next Friend,*
By H. H. HOWARD,
Attorneys for Defendant in Error.

f [Endorsed:] In the Supreme Court of the United States of America. The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, *vs.* Sam'l Calhoun, by Anna Calhoun, his next friend, Defendant in Error. Citation. Filed April 11, 1907. Benj. F. Hegler, Clerk Supreme Court By Jessie Pardoe, Deputy. Henry E. Asp, Charles H. Woods, Geo. M. Green, Attorneys for Plaintiff in Error.

1 In the Supreme Court of the Territory of Oklahoma.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Petition for Writ of Error.

Now comes The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error herein, and says that on or about the 13th day of February A. D. 1907, the Supreme Court of the Territory of Oklahoma entered a judgment herein in favor of Samuel Calhoun, by Anna Calhoun, his next friend, defendant in error, and against this plaintiff in error, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff in error, all of which will more in detail appear from the assignment of errors which is filed with this petition. That the amount in controversy exceeds five thousand dollars ($5000.00), as will more fully appear by affidavit hereto attached, and made a part of this petition as "Exhibit A" thereof.

Wherefore, this plaintiff in error prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this first day of April, A. D. 1907.

HENRY E. ASP,
CHARLES H. WOODS,
GEO. M. GREEN,
Attorneys for Plaintiff in Error, The Atchison, Topeka and Santa Fe Railway Company.

2 In the Supreme Court of the United States.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error and Appellant,
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend,
Defendant in Error and Appellee.

Affidavit.

EXHIBIT "A" TO PETITION FOR WRIT OF ERROR.

Henry E. Asp being duly sworn says that he is one of the attorneys for the plaintiff in error and appellant in the above entitled cause; that he is a resident of the City of Guthrie, Logan County, Oklahoma Territory, and knows what the controversy in the above

entitled cause is. That the action is one for damages on account of personal injuries alleged to have been sustained by the defendant in error, and that the judgment with interest figured to April 3rd 1907 amounts to the sum of eleven thousand six hundred and sixty six dollars, and that said judgment with accrued interest amounted when the judgment and decision in said cause herein taken by writ of error and appeal to this court from the Supreme court of the Territory of Oklahoma when the same was rendered by the Supreme Court of the Territory of Oklahoma on the 13th day of February A. D. 1907 to more than ten thousand dollars, and that the amount involved in this controversy therefore exceeds five thousand dollars exclusive of interest and costs, and that no part of said judgment so sought to be enforced against the plaintiff in error has been paid or remitted, and more than ten thousand dollars therefore, ex-
3 clusive of interest from the date of said judgment, remains due and unpaid.

HENRY E. ASP,
Attorney for Plaintiff in Error and Appellant.

Subscribed and sworn to before me this 30th day of March A. D. 1907.

BERTHA SCHUPP,
[SEAL.] *Notary Public.*

My commission expires July 2, 1910.

Endorsed: No. 1833—In the Supreme Court of the Territory of Oklahoma—The Atchison, Topeka and Santa Fe Railway Company Plaintiff in error, *vs.* Sam'l Calhoun, by Anna Calhoun, his next friend, Defendant in error—Petition for Writ of Error—Henry E. Asp, Charles H. Woods, Geo. M. Green, Attorneys for plaintiff in error—Filed April 1, 1907, Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

4 In the Supreme Court of the Territory of Oklahoma.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error and Appellant.
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error and Appellee.

Assignments of Error.

The plaintiff in error in this action in connection with his petition for writ of error and for appeal, makes the following assignments of error, which it avers occurred upon the trial of the cause, to-wit:

1. The Supreme Court of the Territory of Oklahoma erred in affirming the judgment of the district court of Oklahoma County,

Oklahoma Territory in overruling an objection made at the commencement of the introduction of plaintiff's testimony by defendant below, to the introduction of any evidence in said cause, for the reason that the petition did not state facts sufficient to entitle the plaintiff to recover as against the defendant; and for the reason that the facts submitted in the petition, taken together with the facts stated to the jury by counsel for plaintiff below, disclosed that the plaintiff was not entitled to recover.

2. The Supreme Court erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in overruling the demurrer of the plaintiff in error at the close of the evidence of the plaintiff below, which demurrer was upon the ground and for the reason that the evidence introduced by the plaintiff below was not sufficient and did not prove or tend to prove a cause of action in favor of the said plaintiff and against the defendant.

2. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in overruling the motion and request of the plaintiff in error at the conclusion of the evidence, to instruct the jury to find a verdict for the defendant below, which motion and request of said defendant were upon the ground and for the reason that the plaintiff below failed to prove a cause of action in favor of the plaintiff and against the defendant.

4. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in failing to separately state and number his instructions to the jury as requested by the defendant below, which said request of defendant below is found in original record at page 14 thereof, and the exceptions to the said instructions as a whole as given by the court for the reason that they were not separately stated and numbered and paragraphed being found at pages 242 and 243 of the said record; which said instructions as a whole, numbered and paragraphed and in the manner in which they were given to the jury herewith follow in full as a part of this assignment of error:

Record pages 233-241.

In the District Court of Oklahoma County, Oklahoma Ter.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Instructions.

Gentlemen of the Jury, in this case the court instructs you as follows: This is an action commenced by the plaintiff against the Atchison, Topeka and Santa Fe Railway Company, to recover the sum of $25,000.00 for an injury which he alleges he sustained, by reason of the negligence of the defendant company, as set out and

charged in plaintiff's petition; and to this petition the defendant has filed an answer which is, first a general denial, and then alleges affirmative matter. And to this answer the plaintiff has filed a reply which is a general denial. And the issue for you to determine from the evidence under the instructions of the court, is as to whether the plaintiff is entitled to recover and, if so, in what sum.

The burden is upon the plaintiff to establish his right to recover, by a preponderance of the evidence, and by a preponderance of the evidence is not necessarily meant the testimony of the greater number of witnesses relative to any matter in issue; but by a preponderance of the evidence is meant that evidence which, in the light of all the facts and circumstances appearing upon the trial, is entitled to the more weight and credit.

It is the duty of railroad employés running a railway train to call the names of the stations along the line of road a sufficient
6 length of time before the train reaches the respective stations to enable the passengers for such station to collect their baggage and have a reasonable length of time to get ready to quit the train at such point; but if the conductor on the train in question informed Mrs. Calhoun just after the train left South Guthrie, that the next stop would be at Edmond then and in that event, so far as this case is concerned it is immaterial as to whether the employés or any of them called the station of Edmond before the train reached that place, but as to whether the conductor notified the mother of the plaintiff just after the train left South Guthrie that the next stop would be at Edmond or as to whether the employés of the Company called the station of Edmond before the train reached that point you are to determine in the light of all the facts and circumstances appearing upon the trial. And the burden would be upon the plaintiff to establish that the station of Edmond was not called in the usual manner but the burden would be upon the Company to establish that the conductor notified the mother of plaintiff just after the train left South Guthrie that the next stop would be at Edmond. The law presumes that events occur in the usual and ordinary way and one claiming an exception to the usual and general rule must establish such exception by a preponderance of evidence. Under the evidence in this case it has been shown that the plaintiff on the trip in question was traveling with his mother and that he was under the age at which the railroad company charges fare and under those circumstances it was the duty of the mother of the plaintiff, to care for him and protect him from injury. In other words the duty of looking after the plaintiff on this trip devolved upon the mother of the plaintiff, and not upon the employés of the railroad company; and if the conductor informed the mother of the plaintiff just after the train had left South Guthrie that the next stop would be at Edmond or if the porter on the train called the station of Edmond in the usual and ordinary way a sufficient length of time before the train reached Edmond to enable the mother of the plaintiff to get ready to leave the train at that point then and in that event the railroad company would have fully performed its duty as to notifying the mother of the plaintiff as to the station; and if notice was given in either of those

ways the company had a right to presume that she would be prepared to get off of the train when it stopped and if she failed to attempt to get off of the train until it started it was her duty to stay on the train until it could be stopped unless it reasonably appeared safe to alight, and she would not have the right to alight from a train which was moving so fast as to render it dangerous for her so to do, and it would also be negligence for her or any one else to attempt to place the plaintiff back on the train after he had been taken therefrom if such act reasonably appeared dangerous, and it would be no sufficient excuse, for placing the child in a perilous position to say that the mother and child were separated by the negligence of the defendant company, in failing to stop a sufficient length of time for both mother and child to alight, but you are also instructed that the negligence of the mother or of any other person is not chargeable to the plaintiff nor can his rights be affected thereby. A child of tender years who has not reached that age where it can distinguish a place of safety from one — danger cannot be defeated in its right to recover for personal injury for the negligences of others who have it in charge; and every one who wilfully, wantonly or negligently commits or omits to perform an act when such act is by law required of them, which might reasonably have been expected to result in such injury is jointly or severally liable to such infant; but in this connection you should remember that you cannot find a verdict against the railroad company just because the plaintiff was injured. The fact that plaintiff is an infant may possibly arouse your sumpathy but in this issue sympathy cannot lawfully be considered.

7 The plaintiff's rights in this trial are exactly the same as they would be if he were a grown person, except that contributory negligence cannot be attributed to him, but in this case the defendant company have a right to all of the presumption that would surround it in the running of its trains (of) if the plaintiff were an adult. In other words the company is not required to anticipate that persons in charge of infants will place them in a position of danger, and where this is done without the knowledge or consent of the employés of the company it will not be liable unless it has been guilty of some negligence for which an adult, acting as a reasonably prudent person might recover in similar circumstances.

It is admitted that the plaintiff was safely taken from the train in question and committed to the care of a young man on the depot platform, therefore, even though you find that the station of Edmond was not called that fact can only be considered by you for the purpose of explaining the respective positions of mother and child at that time and if the plaintiff recover it must be by reason of events and conditions subsequent to the time he was taken from the train. It is also undisputed that after plaintiff was placed upon the depot platform one Mr. Jones, picked it up and attempted to return it to its mother. The defendant company contends that this was done at the request of the mother while the mother contends that she told Jones to stand back and protested against him trying to put the child back on the train, but it is undisputed that Jones in trying to put

the child back on the train, struck a truck and fell, and the plaintiff, by reason thereof, came in contact with the moving train and lost his foot. Now, bearing in mind the rules of law which are given in these instructions before the plaintiff can recover it must affirmatively appear by a preponderance of the evidence, either first: that a reasonable time was not given the passengers to alight and that the employés of the company or some one of them saw Jones trying to put the child back on the train and give it to its mother and that such employé or employés knew or ought to have known that such act would probably result in injury to plaintiff or that the injury to plaintiff might reasonably have been anticipated as the result of such act, and that with such knowledge said employés negligently failed to stop the train, when they reasonably could have done so, or second; that the company was guilty of negligence in leaving the truck in a dangerous position and in not having the depot platform properly lighted and that such condition directly and approximately contributed to the injury; and in this connection you are instructed that in order to recover for injury claimed to be the result of some negligence on the part of another a plaintiff must not only prove that the injury was the direct and approximate result of such negligence, but it must appear that the injury is such as might have been reasonably expected to flow from such negligent act or omission. It is not sufficient to authorize a judgment against the defendant in this case to be able to find that in the realm of speculation the injury in question might occur as the result of the conditions on the platform but to establish such negligence as will render the defendant liable you must be able to find from the evidence that the injury was the natural result of such negligence and such as should in the ordinary course of human events have been reasonably anticipated. The company have a right to use trucks on its platform for the loading and unloading of express and baggage and if in using such trucks, the company employ every reasonable precaution to avoid injury to persons getting on and off of its passenger trains that is all that the law requires; and in determining as to whether the company used reasonable care to avoid injury in this case you may take into consideration the length of the platform, the
8 condition of light or darkness on the platform together with all of the other facts and circumstances surrounding the transaction, and you should in this connection also take into consideration the fact as to whether or not the truck was at the time of the accident on or off of that part of the platform used by passengers for getting on and off of its trains. A railroad company have a legal right to adopt such rules and regulations as are necessary for the convenient and economical conducting of its business, provided, however, that the accommodations provided are sufficient to meet the demands of the business, and are all that are reasonably necessary under the circumstances. And in determining as to whether or not the defendant is liable in this case you should also take into consideration the place of the accident; that is as to whether it occurred on or off that part of the depot used by passengers, as the company would have a right to presume in the absence of actual knowledge that persons would

not attempt to get on a fast moving train after it had passed the passenger platform; but all the issues of fact are to be determined by you under the rules laid down in these instructions.

In this case the witnesses have disagreed as to whether or not the porter called the station prior to the time that the train reached the station of Edmond and in this connection you are instructed, that the testimony of a witness who testifies affirmatively that he heard the station called, would be entitled to more weight than the testimony of one who testified that he did not hear it called, provided however, that — believe them to be entitled to equal credit as to truth and veracity for it is well known that in the ordinary affairs of life, where two persons have equal facilities for seeing an object or hearing a sound, the one may see or hear the object or sound and the other may not, depending largely upon whether or not the mind is preoccupied by something else.

The plaintiff in this case as stated before is not entitled to recover simply because he received an injury. The evidence must go further and show that the injury was occasioned by some negligent act or acts on the part of the defendant company, which, in the exercise of reasonable diligence should have been foreseen and avoided and that the injury was the natural, direct and approximate result of such negligence. Should you find for the plaintiff in this case your verdict must be reasonable and not excessive and should be in such sum only as will be a reasonable compensation for the injury sustained which shall include a reasonable compensation for pain and suffering and for the loss of plaintiff's foot.

You should try this case just the same as you would try it if both parties were private individuals, and you should not if, you find for the plaintiff return a verdict for a greater sum than you would if the defendant were a private individual and not a railroad company.

You are the sole judge of the weight of the evidence and the credibility of the witnesses and the law is that where two or more witnesses testify directly opposite to each other, you (and) are not bound to regard the weight of evidence as evenly balanced; but in determining the weight and credit that shall be given to the testimony of any witness, you may take into consideration his appearance upon the stand, his manner of testifying, his apparent candor, and fairness or lack of the same, his intelligence or lac*k* of intelligence his interest or lac*k* of interest in the result of the action, his opportunities or lack of opportunities for seeing and knowing the facts about which he testifies; and together with all of the other facts and circumstances appearing upon the trial, determine the weight and credit that shall be given to the testimony of any witness and give credit accordingly.

9 You are further instructed that if you find and believe that any witness had wilfully testified falsely relative to any material matter in issue, you may disregard all of the testimony of such witness, except in so far as it may be corroborated by the testimony of other credible witnesses or by that of another credible witness or by some other fact or circumstance appearing upon the trial.

You will consider these instructions altogether; you have no right

to consider any part or parts of them to the exclusion of other portions thereof.

After you shall have retired to your jury room, you will select one of your number as foreman, and when you shall have agreed upon a verdict, he will sign it, as such and you will all return with it into the court.

You must be unanimous in your conclusions, unless you all agree no verdict can be found.

Forms of verdict will be handed you by the court.

Dated this 5th day of December, 1904.

B. F. BURWELL, *Judge*.

Endorsed: #4054. In the District Court of Oklahoma County, O. T. Samuel Calhoun, *vs.* A. T. & Santa Fe R. R. Co. Instructions. Filed December 6, 1904. B. D. Shear, Clerk."

5. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number One, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"*Instruction No.* 1.

"Requested by Defendant.

"You are instructed that the plaintiff in this case has failed to prove a cause of action in favor of the plaintiff and against the defendant. You will, therefore, find for the defendant.

"Refused and excepted to by the defendant.

"B. F. BURWELL, *Judge*."

Record page 221.

6. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number Four, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, towit:

"*Instruction No.* 4.

"Requested by Defendant.

"You are instructed that the undisputed evidence in this case shows that the plaintiff successfully alighted from the train on which he was a passenger with his mother without injury and that so far as plaintiff was concerned the contract of carriage between the plaintiff and defendant was successfully completed, and if the

plaintiff was injured while attempting to board the train you will find for the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

Record page 222.

10 7. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number Five, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"Instruction No. 5.

"Requested by Defendant.

"If you find from the evidence that the defendant failed to call the station and failed to properly light the station platform, and further find from the evidence that the plaintiff was alighted from said train without injury to himself the negligence of the defendant in failing to call the station or properly light the platform cannot be said to have been a violation of its contract of carriage or the proximate cayse of the injury, and will find for the defendant.

"Refused and excepted to by the defendant.

B. F. BURWELL, *Judge.*"

Record page 222.

8. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number Six, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"Instruction No. 6.

"Requested by Defendant.

"If you find from the evidence that the defendant failed to announce the station, and further find that the defendant's train did not stop at the station long enough to enable plaintiff and his mother to alight therefrom, and you further find that when plaintiff and his mother reached the platform for the purpose of alighting that the train was in motion and that the platform was dark and the plaintiff and his mother could not see, the plaintiff or the mother of plaintiff would not be justified in handing the plaintiff off the train or in attempting to have the plaintiff placed back on the train while the same was in motion, and you will find for the defendant.

"Refused and excepted to by the defendant.

B. F. BURWELL, *Judge.*"

Record page 223.

9. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case Instruction Number Eight, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

11 "*Instruction No.* 8.

"Requested by Defendant.

"A railroad company, while it is bound to give a passenger a reasonable time and a reasonably safe place to alight, is not bound to assist its passengers in entering or leaving its cars. Such assistance cannot be claimed as a matter of right, unless the passenger is sick, infirm, blind or aged, and known to the railroad company to be such. The evidence in this case does not show that the plaintiff or his mother would come under the above exceptions.

"Refused and excepted to by the defendant.

B. F. BURWELL, *Judge.*"

Record page 224.

10. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number Ten, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to wit:

"*Instruction No.* 10.

"Requested by Defendant.

"You are instructed that the fact of an accident or an injury having taken place in which plaintiff was hurt raises no presumption of negligence on the part of the defendant.

"Refused and excepted to by the defendant.

"B. F. BURWELL, *Judge.*"

Record page 225.

11. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Eleven, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"*Instruction No.* 11.

"Requested by Defendant.

"You are further instructed that if you find from the evidence that the defendant failed to announce the station of Edmond and

further find from the evidence that the defendant stopped the train at said station a reasonable time for passengers to get off and on the train and that the said train was stopped at a place where a suitable platform was provided for entering and leaving the train, and you find further from the evidence that the said train had a baggage car and carried the baggage of its passengers and that the defendant had a truck on the platform at the said baggage car which said truck was left on the platform at a place where passengers were not required to enter or leave the train, you are instructed that the leaving of such truck upon the platform at said place, not intended or necessary for the use of passengers in alighting from or entering the train, such action on the part of the defendant was not negligence,

and if you find from the evidence that after plaintiff had
12 alighted from the train his mother requested the bystanders to put him back on the train, the train then being in motion, and a stranger not in the employ of the company undertook to put the plaintiff on the train and followed the train while it was in motion, running for a distance of one hundred feet or more, and struck against the truck which was in a proper place, you will find for the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

Record pages 225-226.

12. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Thirteen, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"*Instruction No.* 13.

"Requested by Defendant.

"The court instructs the jury that a railway company has the right to presume that passengers will only attempt to get on and off its cars at the places designated by the company for such purpose, and it is not the duty of the railroad company to keep its tracks or platforms clear for those who may see proper to pursue the cars while leaving a depot or station.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

Record page 227.

13. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Fourteen, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"Instruction No. 14.

"Asked by Defendant.

"The Court instructs the jury that if you find from the evidence that plaintiff Samuel Calhoun at the time of the injury was an infant of tender years, to-wit, three years of age or less and you further find from the evidence that his mother Anna Calhoun purchased from the defendant at Arkansas City, Kansas, one ticket for herself to Edmond, Oklahoma, and that under the rules of the railway company, she was permitted to take with her without extra charge, her infant son, the said Samuel Calhoun, plaintiff herein, then the railway company had the right to presume that the said Anna Calhoun would properly care for and guard the said child from danger; and if you further find that the said Anna Calhoun without the knowledge of the servants of the railway company attempted to alight from said train while in motion and handed plaintiff off from said train while in motion to a stranger, and because of the fact that said train was in motion at that time at such a rate of speed that the said Anna Calhoun on account of her own personal safety refused to alight, and while said train was so in motion requested or
13 permitted the said Carl Jones to attempt to place plaintiff back on the train then such conduct on the part of the said Anna Calhoun would constitute negligence that would preclude the plaintiff from recovering in this action even though you should find that defendant's servants failed to call said station of Edmond upon the approach of said train and failed to light the platform of said station, and even though you should further find that the leaving of said truck on the platform at the place where the same was left was negligence on the part of the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

Record page 228.

14. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Fifteen, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"Instruction No. 15.

"Asked by Defendant.

"The court instructs the jury that a railway company may presume that a parent in charge of an infant of tender years, to-wit, three years of age, while riding with such parent upon a railway train will properly care for and guard such child from injury; and if such parent is negligent in the care of such child such negligence will be in law the negligence of such child, and if an infant is

injured while alighting from or boarding a railway train and the negligence of the parent contributes to such injury the infant cannot recover.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

Record Page 228.

15. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Sixteen, requested by defendant below; which said instruction so requested by said defend-nt is in words and figures as follows, to-wit:

"*Instruction No.* 16.

"Asked by Defendant.

"This court at the request of the defendant has submitted to you certain special questions of fact for you to answer, and you are instructed that it is your duty to answer each of these questions fairly as you shall find the truth to be under the evidence and without regard to your general verdict.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

Record page 229.

14 16. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the District Court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Seventeen, requested by defendant below; which said instruction as requested by said defendant is in words and figures as follows, to-wit:

"*Instruction No.* 17.

"Requested by Defendant.

"You are further instructed that if you find from the evidence that the defendant failed to announce the station of Edmond and further find from the evidence that the defendant stopped the train at said station a reasonable time for passengers to get off and on the train and that the said train was stopped at a place where a suitable platform was provided for entering and leaving the train, and you further find from the evidence that the said train had a baggage car and carried the baggage of its passengers and that the defendant had a truck on the platform at the said baggage car which said truck was left on the platform at a place where passengers were not required or expected to enter or leave the train in question you are instructed that the leaving of such truck upon the platform at said

place not intended or necessary for the use of passengers in alighting from or entering the train, such action on the part of the defendant was not negligence, and if you find from the evidence that after plaintiff had alighted from the train a stranger not in the employ of the defendant, without the knowledge or consent of the defendant undertook to put the plaintiff on the train and followed the train while in motion, running for a distance of one hundred feet or more, carrying the plaintiff, under such circumstances that a reasonable prudent person ought to have recognized the danger, and ran against such truck, which caused the injury, you will find for the defendant.

"Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*"

Record pages 229-230.

17. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Eighteen, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"*Instruction No.* 18.

"Requested by Defendant.

"The Court instructs the jury that in determining whether the act of the defendant complained of is the proximate cause of the injury the legal test is: Was the injury of such a character as might reasonably have been foreseen or expected as the natural result of the act complained of. A party is not chargeable with responsibility for results which do not naturally and reasonably follow as the consequence of his conduct; as a matter of law a party cannot be held responsible for injuries which could not reasonably have been foreseen or expected as the result of his conduct.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

Record pages 230-231.

15 18. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Nineteen, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"*Instruction No.* 19.

"Asked by Defendant.

"The court instructs the jury: That where witnesses have testified that they did not hear, or that certain words were not spoken at

a certain time or place, such testimony is what is termed in law as negative testimony and that such testimony is not entitled to as much weight or consideration at the hands of the jury as the testimony of equally credible witnesses who testify to having heard such words spoken on such occasion, such testimony that the witness did hear being what is termed by the law positive or affirmative evidence.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge*."

Record page 231.

19. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in giving to the jury as a part of its instructions to the jury, all that portion of the said instructions beginning with the word "it" in line 20 on page 233 of the record, printed record page —, to and including the word "station" found on page 235 in line 6 of record, printed record page —, which said portion of the said general instructions so complained of is in words and figures as follows, to-wit:

"It is the duty of railroad employees running a railway train to call the names of the stations along the line of road a sufficient length of time before the train reaches the respective stations to enable passengers for such station to collect their baggage and have a reasonable length of time to get ready to quit the train at such point; but if the conductor on the train in question informed Mrs. Calhoun just after the train left South Guthrie that the next stop would be at Edmond, then, and in that event, so far as this case is concerned it is immaterial as to whether the employés or any of them called the station of Edmond before the train reached that place; but as to whether the conductor notified the mother of the plaintiff just after the train left South Guthrie that the next stop would be at Edmond or as to whether the employés of the company called the station of Edmond before the train reached that point you are to determine in the light of all of the facts and circumstances appearing upon the trial. And the burden would be upon the plaintiff
16 to establish that the station of Edmond was not called in the usual manner but the burden would be upon the company to establish that the conductor notified the mother of plaintiff just after the train left South Guthrie that the next stop would be At Edmond. The law presumes that events occur in the usual and ordinary way and one claiming an exception to the usual and general rule must establish such exception by a preponderance of evidence. Under the evidence in this case it has been shown that the plaintiff on the trip in question was traveling with his mother and that he was under the age at which the railroad company charges fare and under those circumstances it was the duty of the mother of the plaintiff, to care for him and protect him from injury. In other words, the duty of looking after the plaintiff on this trip devolved upon the mother of the plaintiff and not upon the employees of the railroad company; and if the conductor informed the mother of the

plaintiff just after the train had left South Guthrie that the next stop would be at Edmond or if the porter on the train called the station of Edmond in the usual and ordinary way a sufficient length of time before the train reached Edmond to enable the mother of the plaintiff to get ready to leave the train at that point then and in that event the railroad company would have fully performed its duty as to notifying the mother of the plaintiff as to the station."

20. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in giving to the jury and instructing the jury as a part of its instructions all that portion thereof beginning with the word "if" in line 7 on page 235 of the record, printed record page —, to and including the word "alight" found in line 20 page 235 of the record, printed record page —, which said portion of the said general instructions so excepted to is in words and figures as follows, to-wit:

"If notice was given in either of those ways the company had a right to presume that she would be prepared to get off the train when it stopped and if she failed to attempt to get off the train until it started it was her duty to stay on the train until it could be stopped unless it reasonably appeared safe to alight, and she would not have the right to alight from a train which was moving so fast as to render it dangerous for her so to do and it would also be negligence for her or any one else to attempt to place the plaintiff back on the train after he had been taken therefrom if such act reasonably appeared dangerous, and it would be no sufficient excuse, for placing the child in a perilous position, to say that the mother and child were separated by the negligence of the defendant company in failing to stop a sufficient length of time for both mother and child to alight."

17 21. The said Supreme Court erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in giving to the jury as a part of its general instructions, all that portion of said instructions commencing with the word "but" found in line 20 page 235 of the record, printed record, page —, to and including the word "infant" found in line 2 on page 236 of the record, printed record page —, which said portion of the instructions so given to the jury is in words and figures as follows, to-wit:

"But you are also instructed that the negligence of the mother or of any other person is not chargeable to the plaintiff nor can his rights be affected thereby. A child of tender years who had not reached that age where it can distinguish a place of safety from one of danger cannot be defeated in its right to recover for personal injury for the negligence of others who have it in charge; and every one who wilfully, wantonly or negligently commits or omits to perform an act when such act is by law required of them, which might reasonably have been expected to result in such injury is jointly or severally liable to such infant."

22. The said supreme court erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in giving to the jury as a part of its general instructions, that portion

thereof commencing with the word "now" in the 6 line, page 237 of the record, printed record page —, to and including the word "anticipated" found in line 5 page 238 of the record, printed record page —, which said portion of the general instructions so excepted to is in words and figures as follows, to-wit:

"Now, bearing in mind the rules of law which are given in these instructions before the plaintiff can recover it must affirmatively appear by a preponderance of the evidence, either first; that a reasonable time was not given the passengers to alight and that the employees of the company or some one of them saw Jones trying to put the child back on the train and give it to its mother and that such employee or employees knew or ought to have known that such act would probably result in injury to plaintiff or that the injury to plaintiff might reasonably have been anticipated as the result of such act and that with such knowledge said employees negligently failed to stop the train, when they reasonably could have done so, or second; that the company was guilty of negligence in leaving the truck in a dangerous position and in not having the depot platform properly lighted and that such condition directly and ap-
18 proximately contributed to the injury; and in this connection you are instructed that in order to recover for injury claimed to be the result of some negligence on the prat of another a plaintiff must not only prove that the injury was the direct and approximate result of such negligence, but it must appear that the injury is such as might have been reasonably expected to flow from such negligent act or omission. It is not sufficient to authorize a judgment against the defendant in this case to be able to find that in the realm of speculation the injury in question might occur as the result of the conditions on the platform but to establish such negligence as will render the defendant liable you must be able to find from the evidence that the injury was the natural result of such negligence and such as should in the ordinary course of human events have been reasonably anticipated."

23. The supreme court erred in affirming the judgment of the district court in giving to the jury as a part of its general instructions, all that portion thereof beginning with the word "the" in the 5th line on page 238 of the record, printed record page —, to and including the word "trains" found in line 17 same page, printed record page —, which said portion of the said instructions is in words and figures as follows, to-wit:

"The company have a right to use trucks on its platform for the loading and unloading of express and baggage, and if, in using such trucks, the company employ every reasonable precaution to avoid injury to persons getting on and off of its passenger trains, that is all that the law requires; and in determining as to whether the company used reasonable care to avoid injury in this case you may take into consideration the length of the platform, the condition of light or darkness on the platform, together with all of the other facts or circumstances surrounding the transaction, and you should in this connection also take into consideration the fact as to whether or not the truck was at the time of the accident on or off of that

part of the platform used by passengers for getting on and off of its trains."

24. The supreme court erred in affirming the judgment of the district court in giving to the jury as a part of its general instructions all that portion thereof beginning with the word "a" in 17th line page 238 of the record, printed record page —, to and including the word "circumstances" found in 22nd line page 238, printed record page —, which said portion of the said instructions so excepted to is in words and figures as follows, to wit:

19 "A railroad company has a legal right to adopt such rules and regulations as are necessary for the convenient and economical conducting of its business, provided however, that the accommodations provided are sufficient to meet the demands of the business, and are all that are reasonably necessary under the circumstances."

25. The supreme court erred in affirming the judgment of the district court in giving to the jury as a part of its general instructions all that portion thereof commencing with the word "and" in 22nd line page 238, printed record page —, to and including the words "instructions" found in line 2 page 239, printed record, page —; which said portion of the general instructions so excepted to is in words and figures as follows, to-wit:

"And in determining as to whether or not the defendant is liable in this case you should also take into consideration the place of the accident; that is as to whether it occurred on or off that part of the depot used by passengers, as the company would have a right to presume in the absence of actual knowledge that persons would not attempt to get on a fast-moving train after it had passed the passenger platform; but all issues of fact are to be determined by you under the rules laid down in these instructions."

26. The supreme court erred in affirming the judgment of the district court in overruling the motion of defendant below to set aside the findings of the jury to certain questions submitted to the jury, numbered 12, 14, 39, 42, and 44, which said motion was for the reason and upon the ground that the answers to the said questions were not supported by sufficient evidence or by any evidence submitted on said cause, which said motion of the defendant is found on record page 265 and the said questions and answers so objected to are in words and figures as follows, to-wit:

12. Did not one of defendant's employees call the station before the train stopped at Edmond Station?

Answer. It was not called.

JOHN Q. SPENCER, *Foreman.*

(Record page 248; printed record page —.)

14. How long did the train stop at Edmond before the accident to the plaintiff occurred?

A. One minute.

JOHN Q. SPENCER, *Foreman.*

(Record page 248; printed record page —.)

20 39. Was the truck left on the platform opposite where the baggage car was stopped in the train when it stopped at the station of Edmond to enable passengers to alight from and board the said train?

A. No.

JOHN Q. SPENCER, *Foreman.*

(Record page 251, printed record page —.)

42. Did the lights in said car shine out through the windows of the car onto the platform?

A. No.

JOHN Q. SPENCER, *Foreman.*

(Record page 252, printed record page —.)

44. Did such lights shine out onto the platform where persons would alight from and enter the car in which plaintiff and his mother were passengers from Arkansas City to Edmond?

A. No.

JOHN Q. SPENCER, *Foreman.*

(Record page 252, printed record page —.)

27. The supreme court erred in affirming the judgment of the district court in overruling the motion of the defendant for a judgment on the findings of the jury notwithstanding their general verdict, which said motion of defendant below is found on record page 267.

28. The Supreme Court erred in affirming the judgment of the district court of Oklahoma County, in overruling the motion and the amended motion of the defendant below to set aside the verdict of the jury and to grant to defendant a new trial, which said motion of defendant is found on record pages 269-270, printed record pages —, and which said amended motion is found on record pages 272-273-274, printed record pages —.

29. The Supreme Court erred in affirming the judgment of the district court in overruling the motion of the defendant below for judgment on the special findings and answers to the special questions submitted to the said jury, the general verdict of the jury to the contrary notwithstanding, which said motion for judgment and the proceedings thereon, together with exceptions of the defend-
21 ant below appear at pages 267 and 278 of the record, printed record pages —, and the said special questions and answers appearing at pages 247-254 of the record, printed record pages —.

30. The Supreme Court erred in affirming the judgment of the district court in rendering judgment in favor of the plaintiff below and against the defendant below, the said judgment of the said district court not being sustained by sufficient evidence and being con-

trary to the evidence and contrary to the law and contrary to the special findings of fact by the jury.

HENRY E. ASP,
CHARLES H. WOODS,
GEO. M. GREEN,
Attorneys for Plaintiff in Error and Appellant.

22 [Endorsed:] No. 1833. In the Supreme Court of the Territory of Oklahoma. The Atchison, Topeka and Santa Fe Railway Co., Plaintiff in Error, *vs.* Sam'l Calhoun, by Anna Calhoun, his next friend, Defendant in Error. Assignments of Error. Filed April 1, 1907. Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy. Henry E. Asp, Charles H. Woods, Geo. M. Green, Attorneys for Plaintiff in Error.

23 In the Supreme Court of the Territory of Oklahoma.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Order Allowing Writ of Error.

This first day of April, 1907, comes The Atchison, Topeka and Santa Fe Railway Company, plaintiff-in-error, by its attorneys, and files herein and presents to the court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

Upon proper consideration whereof the court and the Chief Justice thereof does allow the writ of error, and directs and commands the clerk of this court to transmit to the said Supreme Court of the United States a true and certified transcript of the record and all papers, files and proceedings herein.

It is further ordered that the plaintiff-in-error shall give bond in the sum of Thirteen Thousand Dollars, to be approved by Clerk of this court within 30 days from this date, and upon so doing these proceedings in error and the said bond shall operate as a supersedeas as a stay of all proceedings herein in the Supreme Court of the Territory of Oklahoma and in the district court of Oklahoma County pending said cause in the Supreme Court of the United States.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
[SEAL.] *Clerk of the Supreme Court of The Territory of Oklahoma,*
By JESSIE PARDOE, *Deputy.*

24 Endorsed: No. 1833—In the Supreme Court of the Territory of Oklahoma—The Atchison, Topeka and Santa Fe Railway Co., Plaintiff in error, *vs.* Sam'l Calhoun, by Anna Calhoun, his next friend, Defendant in error—Order Allowing Writ of Error—Filed April 1, 1907, Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

25 In the Supreme Court of the United States of America.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Writ of Error.

To the Supreme Court of the Territory of Oklahoma:

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Supreme Court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in said court before you between The Atchison, Topeka and Santa Fe Railway Company, plaintiff-in-error, and Samuel Calhoun, by Anna Calhoun, his next Friend, defendant-in-error, and where it appears that the matter in controversy exceeds five thousand dollars ($5,000.00), a manifest error hath happened to the great damage of the said The Atchison, Topeka and Santa Fe Railway Company, plaintiff-in-error, as by its complaint and assignment of error appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, command you, if judgment therein be given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States with this writ so that you have the same at Washington on the first day of May next, in the said Supreme Court to be then and there held.

That the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States and of said Territory should be done.

26 It is further ordered and commanded that mandate and execution of said judgment of the Supreme Court of the Territory of Oklahoma be stayed until the final determination of this cause upon condition that the said plaintiff-in-error enter into a good and sufficient undertaking to the defendant-in-error in the sum of thirteen Thousand Dollars, conditioned as required by law, within 30 days.

Witness The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America and Witness the Honorable John H. Burford, Chief Justice of the Supreme Court of the Territory of Oklahoma, this first day of April, in the Year of our Lord One Thousand Nine Hundred and Seven.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma,
By JESSIE PARDOE, *Deputy.*

Allowed:
By JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

27 [Endorsed:] No. 1833. In the Supreme Court of the United States of America. The Atchison, Topeka and Santa Fe Railway Co. Plaintiff in error, *vs.* Sam'l Calhoun, by Anna Calhoun, his next friend, Defendant in error. Writ of Error. Filed April 1, 1907. Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

28 In the Supreme Court of the Territory of Oklahoma.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents:

That We, The Atchison, Topeka and Santa Fe Railway Company, as Principal, and U. C. Guss and Robert Sohlberg, as Sureties, are held and firmly bound unto Samuel Calhoun who sues herein by Anna Calhoun, His Next Friend, defendant-in-error, in the full and just sum of fifteen Thousand Dollars, to be paid to the said defendant-in-error or his certain attorney, administrator or assigns, to which payment well and truly to be paid we bind ourselves, our executors, administrators and assigns jointly and severally by these presents.

Sealed with our seals and dated this first day of April, A. D. 1907.

Whereas, lately at a term of the Supreme Court of the Territory of Oklahoma in a suit pending in said court wherein The Atchison, Topeka and Santa Fe Railway Company is plaintiff-in-error and Samuel Calhoun by Anna Calhoun, his Next Friend, is defendant-in-error, judgment was rendered in said court on the 13th day of

February, A. D. 1907, in favor of said defendant-in-error and against the said plaintiff-in-error and the said plaintiff-in-error having obtained a writ of error from the Supreme Court of the United States for the reversal of said judgment and an order of the Supreme Court of the Territory of Oklahoma staying mandate and execution of said judgment upon the giving by plaintiff-in-error of a good and sufficient bond in the sum of Fifteen Thousand Dollars, and citation having been issued upon said writ of error and served upon said Samuel Calhoun by Anna Calhoun, his Next Friend, defendant-in-error, citing and admonishing the said defendant-in-error to be and appear at the Supreme Court of the United States of America to be holden at Washington the first day of May next.

29

Now the condition of the above obligation is such that if the said The Atchison, Topeka and Santa Fe Railway Company shall prosecute its said writ of error to effect and answer all damages and costs if *he* shall fail to make good *his* plea then this obligation shall be void; otherwise to remain in full force and effect.

Witness our hands this first day of April, in the Year of our Lord One Thousand Nine Hundred and Seven.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
By HENRY E. ASP,
Its Attorney in Fact,
Thereunto Duly Authorized, Principal.
U. C. GUSS,
ROB'T SOHLBERG, *Sureties.*

TERRITORY OF OKLAHOMA, *Logan County, ss:*

U. C Guss and Rob't Sohlberg, of lawful age each being duly sworn each for himself says that he is a resident of the City of Guthrie, Logan County, Oklahoma Territory; that he has read over the above and foregoing bond and knows its contents; that he is worth the sum of fifteen Thousand dollars over and above all his just debts, liabilities and exemptions.

U. C. GUSS.
ROB'T SOHLBERG.

Subscribed in my presence and sworn to before me this 1st day of April, A. D. 1907.

30

[SEAL.]

C. R. HAVIGHORST,
Notary Public in and for said County and Territory.

My commission expires Feb'y 4, 1911.

I hereby approve the within bond and sureties thereto this First day of April, A. D. 1907.

JNO. H. BURFORD,
Chief Justice Supreme Court of the Territory of Oklahoma.

Endorsed: No. 1833—In the Supreme Court of the Territory of Oklahoma—The Atchison, Topeka and Santa Fe Railway Co., Plaintiff in error, *vs.* Sam'l Calhoun, by Anna Calhoun, his next friend—Bond on Writ of Error and Appeal—Henry E. Asp, Charles H. Woods, Geo. M. Green, Attorneys for plaintiff in error. Filed April 1, 1907, Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

31 In the Supreme Court of the Territory of Oklahoma.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Petition for Appeal to the Supreme Court of the United States of America.

The above named plaintiff-in-error, The Atchison, Topeka and Santa Fe Railway Company, conceiving itself aggrieved by the decree and judgment made and entered on the 13th day of February, A. D. 1907, in the above entitled cause, does hereby appeal from said judgment and decree to the Supreme Court of the United States of America for the reasons specified in the assignment of errors which is filed herewith and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

HENRY E. ASP,
CHARLES H. WOODS,
GEO. M. GREEN,
Attorneys for Plaintiff in Error.

Dated this 1st day of April, A. D. 1907.

The foregoing claim of appeal is allowed.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Dated this 1st day of April, A. D. 1907.

Endorsed: No. 1833—In the Supreme Court of the Territory of Oklahoma—The Atchison, Topeka and Santa Fe Railway Company, Appellant, *vs.* Sam'l Calhoun, by Anna Calhoun, his next friend, Appellee—Petition for Appellee—Henry E. Asp, Charles H. Woods, Geo. M. Green, Attorney for Appellant—Filed April 1, 1907, Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

32 In the Supreme Court of the Territory of Oklahoma.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Order Allowing Appeal.

Now on this 1st day of April, A. D. 1907, comes the above plaintiff in error by Henry E. Asp, Charles H. Woods and Geo. M. Green, its attorneys, and files herein and presents to the court its petition for the allowance of an appeal to the Supreme Court of the United States of America and that the transcript of the record and proceedings, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as may be proper in the premises. Upon proper consideration whereof the court and the undersigned Chief Justice thereof does allow the said appeal and directs and commands the Clerk of this court to transmit to the said Supreme Court of the United States at Washington a true and certified transcript of the record and all papers, files and proceedings herein.

It is further ordered that The Atchison, Topeka and Santa Fe Railway Company, appellant, shall give bond in the sum of Thirteen Thousand dollars, to be approved by the court within 30 *das* days from this date and upon so doing these proceedings on appeal and the said bond shall operate as a supercedeas as a stay of all proceedings herein in the Supreme Court of the Territory of Oklahoma and in the District Court of Oklahoma County, in said Territory, pending said appeal to the Supreme Court of the United States of America.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
[SEAL.] BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma,
By JESSIE PARDOE, *Deputy.*

33 Endorsed: No. 1833—In the Supreme Court of the Territory of Oklahoma—The Atchison, Topeka and Santa Fe Railway Co., Appellant, *vs.* Sam'l Calhoun, by Anna Calhoun, his next friend, Appellee—Order allowing appeal—Henry E. Asp, Charles H. Woods, Geo. M. Green, Attorneys for Appellant—Filed April 1, 1907, Benj. F. Hegler, Clerk Supreme Court, By Jessie Pardoe, Deputy.

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34 In the Supreme Court of the Territory of Oklahoma.

No. 1833.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend,
Defendant in Error.

Petition in Error.

And now comes the said plaintiff in error and for its cause of action in error alleges that heretofore, to wit, on the 6th day of December A. D. 1904, in a certain cause pending in the district court of Oklahoma County, in the Territory of Oklahoma, wherein said defendant in error was plaintiff, and this plaintiff in error was defendant, the said defendant in error by the consideration of said court recovered a judgment for the sum of ten thousand dollars ($10,000.00), together with interest thereon from the 6th day of December, A. D. 1904, at the rate of seven per cent. per annum, and a further judgment for the costs of said action, the pleadings in said action and all the orders of the court, together with the evidence introduced on the trial, the rulings of the court thereon and on said trial, together with said judgment and all of the proceedings on which the same is based is embodied in a case made by the plaintiff in error, duly made and served, and by the Hon. B. F. Burwell, the Judge who tried said cause, duly settled and signed, and attested by the Clerk of said court and filed in the court below. Which said original case made is hereto attached, marked for identification "Exhibit A," and is here referred to and made a part of this petition in error, which said case made embodies all the rulings and the proceedings on which they are based and all matters in connection therewith sufficient to enable this court to review said judgment and proceedings and to enable this court to try the assignments of error
35 hereinafter made and each and all of the same by reference to said case made, to review said orders, judgments, and the proceedings on which the said judgment is based. The plaintiff in error alleges that the court below erred to the substantial prejudice, wrong and injury of said plaintiff in error in numerous, divers and sundry rulings in said proceedings, all of which fully appear by the said case made, that is to say:

First. The court erred in overruling the objection made at the commencement of the introduction of plaintiff's testimony by the plaintiff in error to the introduction of any evidence in said cause in the court below, for the reasons stated in said objection found on pages 23 and 206 of the said case made.

Second. The court erred in the admission of certain irrelevant, incompetent, and immaterial testimony offered by defendant in error

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in the court below, over the objection and exception of the plaintiff in error.

Third. The court erred in excluding from the consideration of the jury certain competent, material and relevant testimony offered on the trial in the court below, which rulings were duly excepted to by the plaintiff in error at the time.

Fourth. The court erred in overruling the demurrer of the plaintiff in error at the close of the evidence of the defendant in error, which demurrer and ruling of the court thereon is found in the record at pages 136 and 137 of said case made.

Fifth. Because the court erred in overruling the motion and request of the defendant at the conclusion of the evidence, to instruct the jury to find a verdict for the plaintiff in error, and to which ruling the plaintiff in error excepted at the time, which motion and the order overruling the same will be found on pages 220 and 221 of the said case made.

Sixth. The court erred in refusing certain proper, legal, pertinent and appropriate instructions specially requested by the plain-
36 tiff in error to be given to the jury in said cause, which said special instructions are numbered from one to nineteen, inclusive, and are found on pages 221 to 231, of the said case made.

Seventh. The court erred in giving to the jury in said cause upon his own motion and in its general charge to the jury certain illegal, inappropriate and inapplicable misleading and erroneous instructions, which said instructions appear at pages 233 and 241 of the said case made.

Eighth. Because the court erred in its instructions given to the jury as a whole in that the said instructions are not separately stated or numbered as requested by the said plaintiff in error at the commencement of the trial, and because the said instructions as a whole are misleading, and to the giving of which instructions the said plaintiff in error excepted at the time, the request for the court to so instruct the jury being found at page 14 of the said case made and the exceptions to the said instructions as a whole as given by the court being found at page 242 to 243 of the said case made.

Ninth. The court erred in overruling the motion of the said plaintiff in error to set aside the answers of the jury to special questions numbered 12, 14, 39, 42 and 44, submitted to the jury at the request of the plaintiff in error, the said answers to the said special questions not being supported by the evidence or any evidence in the case, and being contrary to the evidence.

Tenth. The court erred in overruling the motion of the plaintiff in error in the court below for judgment on the special findings and answers to the special questions submitted to the said jury, the general verdict of the jury to the contrary notwithstanding, which said motion for judgment and the proceedings thereon, together with the exceptions of the plaintiff in error appear at pages 267 and
37 278 of the said case made and the said special questions and answers appear at pages 247 to 254 of the said case made.

Eleventh. The court erred in overruling the motion and amended motion of the plaintiff in error in the court below to set aside said

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verdict and to grant a new trial to the plaintiff in error in said cause for the reasons stated in said motion and amended motion for a new trial, which said motions appear at pages 269 to 274, and the proceedings had on the hearing of the motions for a new trial appear at pages 280 and 281 of the said case made.

Twelfth. The court erred in rendering judgment in the court below in favor of the said defendant in error and against the plaintiff in error. The said judgment of the court below not being sustained by sufficient evidence and being contrary to the evidence and contrary to the law, and contrary to the special findings of fact of the jury.

Wherefore, the plaintiff in error prays that this court may review said judgment together with the proceedings on which the same is based and examine the errors complained of herein and upon such hearing that the said judgment of the court below may be reversed and remanded with instructions to the court below to enter a judgment in favor of the said plaintiff in error and such other and further proceedings in the court below as such reversal may warrant together with the costs of this action and for such other and further relief as may be just.

HENRY E. ASP,
CHARLES H. WOODS, AND
GEO. M. GREEN,
Attorneys for Plaintiff in Error.

Filed Nov. 21, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

38 Case-made.

EXHIBIT A.

Filed Nov. 21, 1905.

BENJ. F. HEGLER
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

39 Pages herein mentioned refer to the marginal pages of this record, being the pages of the original case-made.

BENJ. F. HEGLER,
Clerk Supreme Court, O. T.,
By JESSIE PARDOE, *Deputy.*

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41 In the District Court of Oklahoma County, Oklahoma Territory.

#4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, Defendant.

Case Made.

Be it remembered that heretofore to wit on September 25th, 1903 said plaintiff, Samuel Calhoun by Anna Calhoun, his next friend, commenced this action against said defendant, by filing in the District Court of Oklahoma County, Oklahoma Territory, his petition, which is in words and figures as follows:

"TERRITORY OF OKLAHOMA, *Oklahoma County, ss:*

In the District Court of said Territory within and for said County, in the Third Judicial District.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, Defendant.

Petition.

The said plaintiff, complaining of the said defendant, alleges and says:

1. That the said Samuel Calhoun is a minor of the age of three years.

2. The said defendant is, and at all times herein mentioned was, a corporation, organized and existing under the laws of the State of Kansas.

42 3. The defendant is, and at all such times was a common carrier of persons for hire and reward, and as such was and is the owner and engaged in the operation of a line of railroad from Arkansas City in the State of Kansas, into and through the said Territory, upon which is located the Town, village or city of Edmond, in said Oklahoma County.

4. That said Town of Edmond, was and is a place of some 2000 inhabitants, and a regular station and stopping point for the passenger trains of defendant operated on said line of road, and a station to and from which passengers are invited to take passage on such trains, and to and from which a large number of persons take such passage both by day and in the night time, and at which the defendant has and maintains a depot, platform and agent, day and night, for the accommodation of such passengers.

5. That on August 24, 1903, the said Anna Calhoun, both for herself and the said Samuel Calhoun, at said Arkansas City, pur-

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chased of and from the defendant, through its agent at that place a ticket good for passage, to said station of Edmond and return therefrom to said Arkansas City, paying therefor the regular and usual price and sum demanded, and by the terms of which the defendant undertook and agreed to carry and convey said persons from said Arkansas City to Edmond and return them to said point of starting, together with their baggage and luggage intended for their use while so traveling, and for their personal equipment, and to treat them with civility and afford them usual and reasonable accom-odations during such passage and until they were discharged from the train of the defendant.

6. That on the evening of the said day, and after the purchase of said ticket, and being in the possession thereof, and at said Arkansas City, the same being a regular station on said line, the said Anna Calhoun and Samuel Calhoun entered one of the regular pas-
43 senger trains of defendant on said road, and a train which was intended, represented and advertised by defendant to carry passengers therefrom to said station of Edmond, carrying with them their said luggage, and were carried thereon and thereby between said stations, arriving at said station of Edmond, at about the hour of midnight first following said day, and during said passage surrendering their said ticket to the conductor of said train, and in all things observing and keeping the rules of the defendant.

7. That said Samuel Calhoun, being an infant of tender years, and being incapable of exercising any judgment or discretion, was unable to enter upon or alight from said train without assistance; and because of said child and luggage, said Anna Calhoun was unable to enter upon or alight from said train without assistance, all of which was well known to the defendant and its servants in charge of said train when said passengers were so received and accepted as such and at all times during said journey and upon the arrival of said train at said station of Edmond; by reason of which plaintiff says the defendant undertook and was obligated to furnish and give them such assistance as was necessary to enable them to safely alight therefrom.

8. The plaintiff says that as a part of the obligation of defendant to treat passengers with civility, and to afford them usual and reasonable accom-odations, during their said journey, it was the duty of the defendant that the conductor in charge of said train should issue to them his check, duly marked so as to indicate to him the station at which they were to alight from such train, and immediately previous to the arrival thereat to take back such check, whereby they might be advised of the approach of such train to the place of destination, and make ready to so alight; that it was the further duty of defendant that its servants in charge of said train, as the same was approaching such station, to cry out and *train, as the same was approaching such station; to cry out and* announce the same
44 whereby they might have knowledge thereof; and it was the further duty of defendant that said servants should give said passengers notice of the approach or arrival of said train at said station; that all of said things are usual, reasonable and necessary

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for the accommodations of such passengers and to their civil treatment; that said conductor carelessly and negligently failed to take up said check; that said servants negligently and carelessly failed to cry out and announce the approach or arrival of said trains at said station of Edmond; that said defendant's servants in charge of said train carelessly and negligently failed to notify said passengers in any manner of the approach or arrival of said train at said station; that because of such neglect the said passengers were wholly ignorant of the approach and arrival of said train at said station of Edmond, and were not advised thereof by any of said servants in any manner or at any time.

9. The plaintiff says further, that when said train arrived at said station, the night was very dark; that defendant had previously caused lamps to be placed at its depot, station and usual place of alighting at said station of Edmond; that said lights are necessary, usual and reasonable for the safety and accommodation of passengers alighting from trains in the night time; that the servants of defendant carelessly and negligently failed to light said lamps, and the same were not burning at the time said train arrived at said station; that because of such neglect, it was impossible for said passengers to see so as to know when said station was reached, or to see or distinguish persons or other objects at the place of alighting from said train; that the servants of defendant had placed and left a certain truck belonging to the defendant and under its control near to said train and the place of alighting therefrom at said station in a careless and negligent position, and standing diagonal to said train, and which it was impossible to see because of the darkness occasioned by the failure to light said lamps, and which was not in use or there for any lawful or necessary purpose, and which was there and in such position at the time of the arrival of said train at said station.

10. That after said train had arrived at said station of Edmond, and had stopped thereat and with no information from the servants of the defendant, the said passengers learned the fact from other passengers thereon; that none of said servants came to offer or afford any assistance to said passengers in alighting from said train; that knowing of the duty of said servants to give such assistance and relying upon the performance of said duty and expecting them or some of them to appear at the exit from said train for the purpose of rendering such assistance the said passengers undertook to alight from said train; that at the exit from said train said Samuel Calhoun was taken from the train by one Carl Jones, and before said Anna Calhoun could alight from said train the same was carelessly and negligently put in motion by the said servants of defendant; that said Jones was dressed in uniform and because of such darkness so occasioned, it was impossible to distinguish him from servants of defendant in charge of said train, who were likewise so dressed; that said Anna Calhoun believed said Jones to be one of said servants and that he was taking said Samuel Calhoun in pursuance of his duties as said servants and that while said train was moving she believed the same to be temporarily moving for a short distance for

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some proper purpose in connection with the operation thereof, and that the same would again soon stop to enable her to alight therefrom, because of which said facts she remained upon the platform or steps of one of the cars of said train while the same was in motion and that said Jones for the civil purpose of avoiding the separation of her from her child carried said Samuel Calhoun along beside of said train at and near the usual place of alighting therefrom; that while carrying said child and because of the darkness so
46 occasioned by the carelessness and negligence of the defendant in the failure of its servants to light said lamps and in leaving said truck so placed, which said Jones was unable to see by said darkness and came in contact therewith; that the violence occasioned by said contact compelled the said Jones to let go said child who because of his tender age and inability to protect himself was thereby thrown under said train, and the wheels of one of the cars thereof passed over his right foot and leg severing the same, whereby the said foot and lower part of said leg was wholly lost and destroyed, rendering the said Samuel Calhoun a permanent cripple, disabling him from physical and manual efforts and labor, occasioning a lay out of a large sum of money for surgeons' and doctors' fees, to wit: Two Hundred Dollars ($200.00) and permanently impairing his health and rendering him unable of earning a livelihood by the usual efforts of life, all to his damage in the sum of twenty-five thousand ($25,000.00) dollars, and all of which was directly due to the negligence and carelessness of the defendant in the failure of its servants to take up said check, to announce the approach or arrival of said train, and to advise said passengers thereof, and to assist them in alighting therefrom and negligently and carelessly failing to light said lamps, and in carelessly and negligently placing said truck and failing to assist said passengers to alight from said train and because of the dangerous condition of the said place of alighting, occasioned by the darkness and dangerous position of said truck, and the careless and negligent failure to stop said train at said station long enough to enable said passengers to alight therefrom in safety, and the careless and negligent starting of said train before said passengers had alighted.

Wherefore, the plaintiff prays judgment against the defendant for the sum of twenty-five thousand ($25,000.00) dollars, and
47 costs of suit.

SAMUEL CALHOUN,
By ANNA CALHOUN,
His Next Friend,
By H. H. HOWARD,
Attorney for Plaintiff.

Endorsed: "4054. In the District Court. Samuel Calhoun by Anna Calhoun his next friend *vs.* Atchison, Topeka and Santa Fe Railroad Co. Petition. Filed in the District Court, Oklahoma County, O. T. Sep. 25, 1903. B. D. Shear, Clerk, by Will H. Clark, Deputy. H. H. Howard, for plaintiff."

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And thereupon and on the 25th day of September 1903, there was duly issued out of the clerk's office of said Court, a summons, which said summons with the endorsements and return thereon is in words and figures as follows, to wit:

48 *Summons.*

TERRITORY OF OKLAHOMA, *Oklahoma County, ss:*

The Territory of Oklahoma to the Sheriff of Oklahoma County:

You are hereby commanded to notify Atchison, Topeka & Santa Fe Railroad Company, defendant, that it has been sued by Samuel Calhoun a minor, by Anna Calhoun, his next friend, plaintiff, in the District Court of Oklahoma County, Oklahoma Territory, and that it must answer the petition of said plaintiff filed against it in the clerk's office of said court, on or before the 25th day of October, 1903, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons, on or before the 5th day of October, 1903.

Given under my hand and the seal of said court this 25th day of September, 1903.

B. D. SHEAR, *Clerk,*
[SEAL.] By WILL H. CLARK, *Deputy.*

Suit brought for the recovery of money only.

If the defendant fail to answer, judgment will be taken for the sum of $25,000.00 with interest at the rate of — per cent., per annum from the — day of —— 190– and cost of suit.

B. D. SHEAR, *Clerk,*
By WILL H. CLARK, —— *Clerk.*

I received this summons on the 25 day of Sept. 1903 — o'clock — M., and executed the same in my county by delivering a true copy of the within summons, with all the endorsements thereon — F. P. O'Neal as agent for the Atchison, Topeka and Santa Fe R. R. Co. this 26 day of Sept. 1903.

M. A. O'BRIEN,
Sheriff of Oklahoma County, Oklahoma Territory.
By W. C. SADLER, *Deputy.*

49 Endorsed: No. 4054. Page —. Summons. Samuel Calhoun, by Anna Calhoun, his next friend, *vs.* Atchison, Topeka & Santa Fe Railroad Company. Issued September 25, 1903. Returnable October 5, 1903. Answer due October 25, 1903. Filed in District Court Oklahoma County, O. T. Sep. 26, 1903. B. D. Shear, Clerk, by Will H. Clark, Deputy. H. H. Howard, Plaintiff's attorney.

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I hereby certify the within to be a true copy of the original summons now in my possession, with the endorsements thereon, this 25 day of Sept. 1903.

—— ——, *Sheriff*,
By W. C. SADLER, *Dept.*

Sheriff's Fees.

Serving summons, first person	$ .50
Additional persons:	
Cop— of Summons	.25
Mileage — miles —	—
Total	.75

—— ——, *Sheriff.*

50 And thereafter and upon October 26th, 1903, the defendant filed its answer, which said answer with the endorsements thereon is in words and figures as follows, to wit:

"In the District Court of Oklahoma County, Oklahoma Territory.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Answer.

Comes now the defendant in the above entitled action and for its answer to the petition of the plaintiff on file herein admits its incorporation as alleged in said petition and denies each and every other material allegation therein contained.

2nd. For a second and further defense, this defendant alleges and avers the fact to be that on the night of the 24th day of August 1903, the plaintiff was traveling on one of this defendant's passenger trains in charge of his mother, Anna Calhoun, plaintiff, being then and there a child of tender years, and destined for the Town of Edmond in Oklahoma County; that before the arrival of said train of this defendant at said Town of Edmond, this defendant by its agents and servants, in charge of said train, duly announced the approach of said train to Edmond in a coach in which the said plaintiff in charge of Anna Calhoun, his mother, was riding so that all the passengers riding in said coach could have known and did know of the approach of said train to the station of Edmond, that said train was approaching said station and would stop at such station so that all passengers destined to Edmond could leave the train; that notwithstanding such announcement the plaintiff's
51 mother, who then and there had charge of the plaintiff, failed to make any preparation to leave such train until after it

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had stopped at the station of Edmond a sufficient time for her to have alighted from said train and until about the time said train was ready to leave said station of Edmond; the said Anna Calhoun thereupon gave the plaintiff, Samuel Calhoun, to a stranger, Carl Jones, who agreed to take the plaintiff off of the train in safety and the plaintiff's mother, Anna Calhoun, had plenty of time to alight from said train in safety but failed to do so and after said train was in motion she went on to the steps of said train and called to said Carl Jones to bring the plaintiff, Samuel Calhoun to her, notwithstanding the fact that it was night time, and she insisted on such stranger running to such moving train with said Samuel Calhoun in his arms, and the said stranger was looking at said Anna Calhoun, and trying to run with the said child to catch said train and was not looking where he was walking with any regard for his safety or that of said child; that said truck over which said stranger stumbled with plaintiff, Samuel Calhoun, was on the south part of this defendant's platform; was not at a point where passenger coaches would stop to take off passengers from the train in question and was not at a point where said passenger train did stop for passengers, and said truck had been taken there only a few moments before by an agent of this defendant for the purpose of loading baggage on said train, which was a necessary part of this defendant's work and had not been in such position to exceed ten minutes and was standing on said passenger platform for the purpose of loading said baggage on the train and the said Carl Jones in charge of the plaintiff could have seen said baggage truck had he exercised any care whatever and had he not been running with said child in his arms at the command of plaintiff's mother, and looking at the said Anna
52 Calhoun standing on the steps of this defendant's train while so running. On which account if the said plaintiff was injured as alleged in said petition, said injury was the result of the carelessness and reckless misconduct of the said Anna Calhoun and of the said Carl Jones to whom the plaintiff had been entrusted, which contributed directly to the injury complained of and on which account the plaintiff cannot recover herein.

Wherefore, this defendant having fully answered asks that it may go hence and recover its costs herein expended.

HENRY E. ASP,
J. R. COTTINGHAM,
SHARTEL, KEATON & WELLS,
Attorneys for Defendant.

Endorsed: "No. 4054. Oklahoma County Dist. Court. Samuel Calhoun by Anna Calhoun, his next friend *vs.* The A., T. & S. F. Ry. Co. Answer. Filed Oct. 26, 1903, B. D. Shear, Clerk."

And thereafter and upon October 30th, 1903, the plaintiff filed its reply, which said reply with the endorsements thereon is in words and figures as follows, to wit:

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53 TERRITORY OF OKLAHOMA, *Oklahoma County, ss:*

In the District Court in said Territory within and for said County, in the Third Judicial District.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Reply.

The said plaintiff for reply to the answer of defendant in said cause denies each and every allegation in said answer contained.

Wherefore, the plaintiff prays judgment, etc.

SAMUEL CALHOUN,
By ANNA CALHOUN,
His Next Friend, Plaintiff,
By H. H. HOWARD,
R. M. CAMPBELL,
Attorneys.

Endorsed: "# 4054. In the District Court. Samuel Calhoun, etc. *vs.* A. T. & S. F. Ry. Company. Reply. Filed in District Court, Oklahoma County, O. T. October 30, 1903, B. D. Shear, Clerk. By Will H. Clark, Deputy."

54 And now on this first day of December, A. D. 1904, the same being one of the days of the regular October 1904, term of this court, the above entitled cause coming on to be heard before Honorable B. F. Burwell, presiding judge, and the plaintiff being present in person and by Mrs. Anna Calhoun, his next friend, and by his counsel H. H. Howard, Sam Hooker and T. G. Chambers, and the defendant being present by its attorneys, Henry E. Asp and Geo. M. Green, the following proceedings were had, to wit:

Thereupon a jury of twelve good and lawful men is duly empanelled and sworn to try said cause, whereupon the jury is sworn to try said cause.

And thereupon and at the beginning of the trial, the defendant requested the court to instruct the jury in writing, and to separately state and number his instructions as provided by the statute.

55 Whereupon, Mr. Hooker makes the following statement to the Court and jury, of the facts expected to be proven by the plaintiff:

This defendant is a railroad corporation, and in August, 1903 the month and the year upon which this accidence happened, it owned and operated a system or a line of railroad running through Arkansas City, Kansas, to Edmond, Oklahoma, and to Oklahoma City, Oklahoma, and on down to the southern portion of Texas. At those points it had depots and agents for the better conduct and manage-

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ment of their business. Now the plaintiff in this case will show that about the 23rd or 24th of August, 1903, Mrs. Anna Calhoun, who is the mother of the child, Samuel Calhoun, who is the plaintiff in this case, purchased a ticket for herself at Arkansas City to Edmond, Oklahoma and return; and we will show, Gentlemen, that during that time, under the rules and regulations of the defendant company, a child of three or four years old, the age of the plaintiff in this case, was permitted, in the care and custody of its parents, or a person in the place of a parent, to travel without a ticket, and that in this case and upon this occasion, the purchase of a ticket by the mother was sufficient for the transportation for both mother and child, and that the transportation of that ticket by the mother in this case was sufficient guaranty that both mother and child should be transported from Arkansas City to Edmond free from harm and injury.

Now, a common carrier, as you all know, has certain duties and obligations to its patrons, and a violation of which, if an injury results to the patron, will render the company liable in damages for such injury or harm as the patron may receive. Now, we believe, Gentlemen, that we will be able to show you, beyond the peradventure of a doubt, that this company owed this plaintiff certain obligations which it was bound to discharge and, failing to
56 discharge that the defendant is liable to the plaintiff for such injuries or damages as may occur to him by reason of any breach thereof.

Now, at the outset, I want you to bear this distinctly in mind: It is our contention in this case (and I believe it is the law) that the purchase of that ticket by Mrs. Calhoun at Arkansas City, was a guaranty on the part of the company that it would transport her and her child to Edmond, and back to Arkansas City without harm and without injury,—the two traveling as one. Now we will show you, Gentlemen of the jury, that it was the duty of the railroad company, for the accommodation, for the convenience and for the safety of its patrons, to announce the station at which the train is to stop, at their destination, in ample time so that they may get together their luggage and their baggage and be prepared to alight at that station when the train arrives there. Now we all know that this is customary; we all know that this is a duty that the railroad company owes to its patrons,—a duty that the railroad company owed to the plaintiff in this case upon this occasion,—which duty we will show to you that it did not perform. We will show to you by the proof that, when this train arrived at Edmond, the station was not called or announced in that car, and that Mrs. Calhoun, the mother of the child, in whose care and custody it was, did not have any notice whatever that she had arrived at the point of her destination; that the train crew totally failed to announce that fact, and that not only Mrs. Calhoun, but other passengers upon that train, who intended to leave it at Edmond, were not appraised of that fact, so that they might alight in safety.

Then again, gentlemen of the jury, we will show you that it is the duty of a railroad company to its patrons and to its passengers to stop its trains a sufficient length of time to enable the passenger to leave the train in safety, without any harm to himself,—without

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any injury to himself. This was not done. This duty was
57 not fulfilled or performed by the company towards the plaintiff in this case. We will show to you, gentlemen, beyond a doubt, that the train upon this occasion was from 30 to 40 minutes late, and that the conductor and parties in charge of the train were in a great hurry, presumably to make up the lost time, and that, when they arrived at the town of Edmond, (which is, as you know, a little city of twelve hundred or two thousand people, 12 or 15 miles north of here) they seemed in a great hurry to stop and get away,—and that they did not, upon this occasion, stop their train there long enough to enable Mrs. Calhoun or other passengers to alight in safety. Further than that, we will show you (and we believe it is the law, and believe that the court will so instruct you) that it is the duty of the railroad company, when its passengers have baggage or other parcels or bundles, so that they cannot alight from the train without a great deal of unnecessary worry and trouble,—that it is the duty of the railroad company to assist them and help them alight. And upon this occasion, we will show you that they knew,—that the officers in charge,—the railway conductor and the porter and the brakeman knew that Mrs. Calhoun had a small child and several grips with her,—one grip and an umbrella, perhaps,—and that they totally failed, upon this occasion to assist her to alight from that train at Edmond, and left her entirely without any assistance whatever. This, we believe, was a violation of the duty that they owed to her upon that occasion.

Then, another point, we believe that a railroad company should keep its platform and depot sufficiently well lighted to enable the passengers to see what is going on on the platform, to enable them to distinguish objects, and to keep them from falling over what may be around on the platform; in other words, to have it so well lighted
to enable men to see what they are doing. Now, upon this
58 occasion, we will be able to show you, Gentlemen, that this platform was absolutely dark; that it was so dark that you could not recognize a man standing two or three feet from you; that it was so dark that you were unable to recognize or state what objects were upon the platform; and, as subsequently developed in this case, by reason of that darkness, the injury to this child happened. Now, the proof will show you, gentlemen, that there was a truck,—one of these baggage trucks which you have all seen, located upon the platform there, and that the agent of the company negligently permitted it to be right up next to the train,—right on the wooden part of the platform, from which and to which the passengers got on and off of that train. They let them remain there, and when this lady attempted to get off the train, after she had been notified by some parties on the train that it was Edmond, she got her things together and got to the door of the car, right out on to the platform, and, in the act of stepping down on the steps of the platform, and the train started, and she was afraid to alight. Some gentlemen, whom we believe,—a gentlemen by the name of Mr. Robertson, took the child and handed it on to the platform and told her not to alight, that that train was going too fast, and that she exercised care and prudence

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upon that occasion and did not attempt to alight, but stayed there on the platform of the car and let the train go on. Well, by that time the child was on the platform in the hands of a young man by the name of Robertson, and the proof will show to you that the train was then going out; and a young man by the name of Carl Jones, who was at that time a bus-man of the O. K. Bus and Baggage Company, whose duty it was to run up and down the road and solicit orders and trunks and so forth, for his line, dressed in a uniform similar to that of the train crew,—and the proof will show you, Gentlemen, that Mrs. Calhoun hollered to him not to
59 attempt to put the child on the train,—she saw that an effort was being made in that direction—and she hollored to him, "Don't put him on; don't put him on,"—and this boy came along and seeing that the mother and child were about to be separated, and knowing that a two year old or a three year old child left alone upon a depot platform at 12 o'clock at night, among strangers was in a particularly perilous condition, grabbed the child and attempted to put it upon the car, and while running along by the side of the train, and endeavoring to put the child upon the train, he ran against this truck which the company had negligently left standing upon the south end of that platform, and in doing that, he fell and threw the child under the train, and the train ran over his foot—one of his feet right across there, and severed it from his limb. Amputation was necessary and the leg was—or foot,—was amputated about here.

Now, the proof will further show, gentlemen, that the conductor came and took up Mrs. Calhoun's ticket, as it was customary usually for conductors to do, and issued her a ticket or a slip or a check, which she had and which she endeavored to keep where the conductor would see it, so that he might know that she was to stop at Edmond; and that, after the train left Arkansas City the conductor came to her a second time and asked her if he had taken up her transportation and she told him "yes" that she was going to Edmond, Oklahoma, and he says "Oh, yes, I recognize you now"; and yet, notwithstanding this repeated notice, we will show to you, as I stated, that he did not,—he nor none of his crew,—announce that station so that she might have an opportunity to alight there. Now the proof will further show to you, gentle[illegible], that after this accident occurred, the conductor in charge of the train, did not know whether the station had been called or not. And there is another feature in the case which is that Mrs. Calhoun was a total stranger in that portion of the country; I believe this is the first time in her life that she has been south of the Kansas line; she knew
60 nothing about the location of the stations; she did not know where Edmond was: whether it was on the south side of Oklahoma or on the other side of Guthrie, and so depended entirely and absolutely upon the train crew to make that statement for her. Now, Gentlemen, I believe that is a statement of the facts in the case and a statement of the acts of negligence that we believe that the company has been guilty of.

Whereupon, counsel for the defendant, Mr. Henry E. Asp, makes

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the following statement to the Court and jury, of the facts expected to be proven by it:

If the Court please and Gentlemen of the jury, sometimes in the affairs of men, circumstances happen that entail a loss or an injury that is to be regretted. The facts in this case will show that the mother of the plaintiff, Mrs. Calhoun, as stated by the plaintiff, bought a ticket at Arkansas City for Edmond; that she got on the train with this plaintiff in her care, a little boy then between two and three years old; the child was in her care. She rode on the train from Arkansas City until the train passed South Guthrie, which is the dispatcher's office at Guthrie, the last stop on the road from Arkansas City to Edmond. The evidence will show that at this place the conductor went to Mrs. Calhoun and informed her that the next stop was Edmond. There may be some conflict about the statement of two witnesses upon that proposition, but the circumstances will show conclusively that the conductor is right. When they reached Edmond, the station was announced. I don't know whether the conductor knew that it was announced or not; it was not his business to know; the porters make the announcement, and there will be the testimony of three or four witnesses who actually heard the announcement made. The plaintiff will rely upon the statement of witnesses who say that they did not hear it. The station was announced. The record of the train on that night at Edmond
61 shows that it stopped at Edmond for four minutes—four minutes—testimony that cannot possibly be refuted. For some reason,—God only knows what; I don't—that woman sat there in that train with that little child, and, after a while asked somebody if this was Edmond; and they told her yes, and she got up—leisurely got up—leading that little child, and as she got to the door the train started, as the evidence will show beyond question, she walked out on to the platform, and, with the train in motion, gave that baby to W. W. Robertson, who was on the platform, and he gave it to this young man Jones and said "Keep this child, we will have the train stopped for the woman to get off." She says "Will some gentleman take my child" with the train then in motion; and the train was then going, as counsel says, so fast that she did not dare to get off, and she did not get off, and she stayed on that train and let them take her baby from the train. And then she says "Give me back my baby" with the train running in that way, and the little boy, the son of Mr. Robertson, who took the baby off, handed it to Carl Jones and Carl ran with the baby alongside of the train and he says to the mother up there under the light of the platform of the car, "For God's sake take the child; for God's sake the child," and she stood there without protest against putting it back and without making any effort to take the baby,—she stood there——

Mr. HOWARD: —Wait just a moment. There is one question that may arise in this case that perhaps had better be disposed of here, and I raise the objection to the counsel's stating negligence on the

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part of the mother, or anything that would tend to show negligence upon her part——

The COURT: He has a right to state what occurred there,—the circumstances in which the child was injured.

Mr. HOWARD: All right; some other time will do as well.

(Statement continued:)—Those are the facts that will appear in evidence; that boy ran along side of that train, he increasing
62 his speed as he went until he ran against this truck, and he dropped the baby and the unfortunate accident happended and this baby lost his foot. Nobody regrets it more than I do,—or can. The truck was on the platform at a place on the platform where it had a right to be; it was pulled out from the baggage car; it was a baggage truck pulled out from the baggage car, and on that part of the platform opposite the baggage car, and where people had no business to get on or off this train.

The testimony will show that this truck was left over 100 feet from the point where this car stopped for these people to alight from this train; that this train stopped, the south end of this coach from which they did alight, stopped right opposite the depot with the bay window in the d-pot; that there was a lamp standing right in the bay window, shining out through the windows upon this platform,—right at the point of the steps where they were to alight from this train. The testimony will show that this was a fine day coach, lighted with *Pinch* gas lights; that there were six gas lights on the inside of the coach, and shin-g out through the windows of the coach, and that there was another gas light in the vestibule of the coach, and another gas light at the east end of the car right over the platform in the space where they were to go down; that is what the evidence will show; and that she stood with this light upon her, looking out upon the platform and, with the train in motion, gave that baby to this stranger to this man Robertson, who gave it to his boy who placed it in safety upon the platform, and that then, in response to her cry, the baby was put back or endeavored to be put back on the train by a stranger not in the employ of this company, and that, in attempting to put it in, the baby was injured. That will be the facts.

The facts will show that the porter of this car, after the train stopped, went to the platform, took his stool, set it down at
63 the steps of the coach and waited there until, as he supposed, all the passengers had gotten off, and that then, in pursuance of his duty, he went down to the baggage and express car, where the agents of the company were unloading baggage, and loading and unloading express; that he stayed there until the baggage and express had been loaded; that then the porter went down to the front end of the baggage coaches next to the engine, as it was his duty to see that there wasn't any bums on the train, and that the conductor called out "All on board" loud enough for the people inside of the coaches to hear,—waiting a reasonable length of time to give the signal to go, and the train started and had started when that woman with that baby was in the door of the coach going out. The

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conductor stepped up as the train came along, upon the first steps of the smoker,—the south end of the smoker,—the train was going south,—and this woman was either then just going out of the door of the coach in which she had been riding, and he knew nothing about her presence or her danger, and knew nothing about the danger until this child had been placed,—the porter knew nothing about the danger until the child had been placed. The testimony will show that it was the duty of the brakeman upon that train, when the train stopped, to stay in the rear end of that train, and look out for danger of a collision, and the testimony will show that the brakeman on that train at that time when it stopped went to the rear end of the train to watch and guard against a collision, as it was his duty to do under the rules, until he saw the conductor give the sign for the train to move on, and that then he got on to the train and took out his watch and noted the time that the train had been there in his book, and it was only after he had noted the time in his book that he heard about the accident, and the train was stopped. Those are the facts and circumstances, gentlemen, of the jury, and if these facts are made to appear to you, gentlemen of the jury, as I believe they will be by the testimony of these witnesses, under the
64 instructions of the court, I believe that it will be your duty to find a verdict in this case for this defendant.

Whereupon the plaintiff introduces his witnesses, who are examined as follows and in the following order:—

65 C. R. DAY, (DR.) is the first witness called to the stand by the plaintiff, who, after having been first duly sworn, gives the following testimony under oath:

By Mr. ASP:

Mr. ASP: The defendant now objects to the introduction of any testimony in this case, first, for the reason that the petition herein does not state facts sufficient to entitle the plaintiff to recover as against this defendant, and moves the Court, in addition thereto, to find a verdict for the defendant in this case upon the facts as stated in the petition and as stated to the jury by counsel for plaintiff, for the reason that the facts as stated in the petition and as stated by counsel for the plaintiff, show that the plaintiff is not entitled to recover.

Objection and motion overruled. To which defendant excepts.

Q. Where do you live, Doctor?
A. At Edmond, Oklahoma.
Q. How long have you resided in Edmond?
A. Nearly four years.
Q. What is your vocation?
A. The practice of medicine.
Q. How long have you been engaged in the practice of medicine?
A. About fourteen years.
Q. How long at Edmond?
A. Almost four years.

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Q. You are a legally authorized practicing physician of Oklahoma Territory?
A. Yes sir.
Q. Do you know the plaintiff, Samuel Calhoun in this case?
A. Yes sir.
Q. When did you first see him?
A. It was on the night of August 23 or 4th, 1903.
Q. Were you called to attend him as a physician?
A. Yes sir.
66 Q. Where was he, Doctor, when you first saw him?

Mr. Asp: The defendant objects for the reason that the fact of the injury is admitted.
Overruled. Exception.

A. He was in his mother's arms in the waiting room of the depot at Edmond.
Q. What time of night was that, Doctor?
A. It was near midnight.
Q. Where was the train at the time you reached the depot that night?
A. Standing on the track south of the station a little ways.
Q. Do you know how many cars or coaches were attached to that train?
A. No sir, I think not.
Q. What was the condition of the platform at the time you arrived at the depot, as to being lighted or not?
A. There was no light on the platform at the depot when I arrived, except there was a little light there shining from the operator's lamp, from the bay window of the station.
Q. Well, state to the jury whether or not the platform was light or dark?

Mr. Asp: We move to strike out the last question,—the answer to the last question, for the reason that it relates to a time subsequent to the accident, and for that reason is incompetent, irrelevant and immaterial.
Objection sustained.

Q. You say that the train was standing south of the depot?
A. Yes sir.
Q. Did you see any train crew around there, Doctor?
A. Yes sir.
Q. What were they?
A. I saw the conductor.
Q. Did you have any conversation with the conductor?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and relating to a time subsequent to the accident.
Objection sustained.

Q. What injury, if any, Doctor, had the plaintiff Samuel Calhoun, received?

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67 Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and for the further reason that the injury is admitted.

Overruled. Exception.

A. The right foot was crushed off, through the instep and heel, and the upper portion of the injury was badly lacerated, a portion of the ligaments having been pulled out from further up.

Mr. Asp: The defendant moves to strike out the testimony of the witness as to the injury, for the reason that the same is incompetent, irrelevant and immaterial. The injury is admitted.

Overruled. Exception.

Q. Were you through answering that question?

A. Yes sir.

Q. Well, what was done, Doctor, to the injured limb?

Mr. Asp: Objected to for the same reasons as to the last question.

Overruled. Defendant excepts.

A. It was necessary to amputate the limb.

Q. Was it amputated?

A. Yes sir.

Q. At what point?

A. At the middle third or half way between the ankle and the knee.

Q. Why was it necessary to amputate the limb so high up?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial not in any way relating to any issue in this case, and for the reason that the injury is admitted.

Overruled. Exception.

A. Because of the fact that the tissues were torn and pulled out to such an extent that we had to go up that high to get sound tissues, and so as to get enough to cover the end of the bone.

Q. Was the child conscious at the time you saw him?

A. Yes sir.

Q. State to the jury if he was suffering, and, if so how——

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in this case and as calling for a conclusion of this witness.

Overruled. Exception.

68 A. The child was crying and screaming when I entered the station to such an extent that it was necessary to give it a hypodermic injection of morphine to relieve the pain.

Mr. Asp: The defendant moves to strike out the answer to the last question, for the reason that it is not responsive to the question, and, second, for the reason that it is incompetent, irrelevant and immaterial, and not relating in any way to any issues in this case, and for the reason that the injury is admitted.

Overruled. Exception.

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Q. Was the foot, Doctor, cut entirely off?
A. Yes sir.
Q. Did you attend the plaintiff, Samuel Calhoun, during that injury?
A. Yes sir.
Q. How long was he confined to his bed?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, not in any wise affecting any issues in this case.
Objection overruled. Defendant excepts.

A. I could not answer that question, and stated the especial time, without having my books to refer to; I can't remember.
Q. Well, state to the jury whether the accident was painful or not,—whether he suffered a great deal during that time or not?
A. Yes, all those cases suffer a great deal, following any amputation, there is an extra amount of pain and suffering.
Mr. HOOKER: Doctor, did you have any conversation with the conductor after the accident, about the accident?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, relating to a time subsequent to the accident.
Objection sustained. Plaintiff excepts.

Cross-examination.

By Mr. ASP:

Q. Doctor, you did not get to the platform until after the accident, did you?
A. No sir.
69 Q. You don't know how the car in which the plaintiff was riding was lighted?
A. No sir.
Q. You don't know what lights shone out of the car windows after the accident?
A. No sir.
Mr. HOOKER: Was the platform alight or dark at the time you arrived at the depot?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, and relating to a time subsequent to the accident.
The COURT: The objection will be sustained at this time; that may be competent.
Plaintiff excepts.
The COURT: It is not at this time, tho'; if you make it competent, why, I will admit it at the proper time.

J. W. HOWARD, is the next witness called to the stand by the plaintiff, and gives the following testimony under oath:

By Mr. HOOKER:

Q. Doctor, are you a legally authorized practicing physician of Oklahoma Territory?
A. Yes sir.

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Q. Where do you live?
A. At Edmond.
Q. How long have you lived at Edmond?
A. Well, since November 1889, in Edmond and the vicinity of Edmond.
Q. Do you know the plaintiff, Samuel Calhoun?
A. Yes sir
Q. Were you called in your capacity of a physiciaır to attend him at any time?
A. Yes sir.
Q. When, Doctor?
A. Well, it was in the latter part of August of last year.
Q. Where was it?
A. It was at the depot.
Q. For what were you called, Doctor?
A. Well, I was called over the telephone to come to the depot; that there was a boy that had his foot cut off.
Q. Well, what did you find?
70 A. Well, when I got there, Mrs. Calhoun was sitting in the operator's office, the telegraph operator, with this child in her arms.
Q. Was he injured in any way?
A. Yes sir.
Q. How?
A. His right foot was gone.
Q. Well, what was the condition of the injury to the foot?

Mr. Asp: The defendant objects as incompetent, irrelevant and immaterial, for the reason that the accident—the injury—is admitted.

Overruled. Defendant excepts.

A. The injury—it was mangled and torn——
Q. Talk louder so that the jury can hear.
A. I say, the limb was mangled and torn,—the lower part of the limb where the foot was off.
Q. Was he conscious?
A. Yes sir.
Q. What was the condition of the injury as to being painful or not?
A. Well, he wasn't suffering very much with pain when I arrived there; when I arrived there the child was quiet.
Q. Were you the first physician there?
A. No sir.
Q. Was Dr. Day there at the time you arrived?
A. Yes sir.
Q. What was done there towards doctoring the child?
A. There was nothing done there.
Q. Well, subsequently?
A. We took him in a buggy and carried him up to Mr. Grigsby's there in town, and I administered an anesthetic and Dr. Day assisted, and Fletcher amputated the limb.

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Q. Where was it amputated?
A. It was amputated at the lower part of the middle third.
Q. Why was it necessary to amputate it that high up?
A. It was lacerated so badly that you had to amputate it that high in order to get the flexion right.

Mr. Asp: It is understood that all this is objected to.
Objection overruled. Exception by defendant.

Q. Did you attend the child, Doctor,—the treatment of his injuries or not?
A. Part of the time, yes.
Q. Do you know how long he remained in bed?
71 A. No sir, I do not.
Q. What was the condition of the platform, Doctor, at the time you got there, with reference to being lighted or dark?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial; not responsive to any issue in this case, to the competency of the witness, and relating to a time subsequent to the time of the accident.
Objection sustained, at this time. Plaintiff excepts.

Frank O'Neal is the next witness called to the stand by the plaintiff, who, after being first duly sworn, testifies as follows:—

By Mr. Hooker:

Q. Where do you live Mr. O'Neal?
A. Oklahoma City.
Q. What is you- avocation?
A. Nothing at present.
Q. What were you doing in August, 1903?
A. I was agent for the Santa Fe railroad.
A. At this point?
A. Yes sir.
Q. How long have you been in the railroad business?
A. Between 12 and 13 years.
Q. Are you acquainted with the rules and regulations of the Santa Fe railroad company with reference to the transportation of children, two or three or four years old, and in the company of their parent——
Mr. Asp: Pending the answer to the question I would like to ask the witness a question.
The Court: All right.
Mr. Asp: Are those rules printed?
A. How is that?
Mr. Asp: Are those rules printed,—or unwritten?
A. Why they are printed.
Q. They are printed, are they?
A. They are printed.
Q. Furnished in that form?
A. Yes sir.

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Mr. ASP: The defendant objects to the question as not the best evidence.

72 The COURT: I don't think that that would go to this particular question,—you are anticipating the proposition. He asked him if he knows.

Mr. ASP: Well, all right.

Q. You say those rules are printed?
A. Yes sir.
Q. Have you a copy of them?
A. No sir.
Q. Do you know where you can get a copy of those rules?
A. There should be a copy in the ticket office.

Mr. ASP: Objection withdrawn; I will let him testify as to what they are.

Q. State to the jury what those rules and regulations are with reference to that fact?

Mr. ASP: With reference to what fact?

Q. To the fact as to whether it is necessary for a child two or three years old, in company with its parents, to buy a ticket, or a ticket to be bought for it, or was at that time?

A. It wasn't necessary to have a ticket for a child under five years of age.

Cross-examination.

By Mr. ASP:

Q. That is where it was accompanied by its parent on the train?
A. Yes sir.
Q. The parent on the train, under those circumstances being supposed to take care of the child?
A. I should say, yes.
Q. A child under five years old, under the rules, is supposed to be as much under the care of the parent as an infant at the breast?

Mr. HOWARD: If the court, please, I object to that as incompetent; it being a question of law.

Sustained. Defendant excepts.

LULU GRIGSBY (Mrs.), is the next witness called to the stand by the plaintiff, and gives the following testimony under oath:

73 By Mr. HOOKER:

Q. Mrs. Grigsby, where did you live in August, 1904?
A. In Edmond.
Q. 1903 I mean.
A. In Edmond.
Q. Were you at the depot on the night that Samuel Calhoun received the injury?
A. I was not there at the time of the accident; I was near there, and was there shortly afterwards.

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Q. Where was the train standing at the time you arrived there? —at the depot?
A. Just below the platform.
Q. Where was the child when you arrived at the depot?
A. In its mother's arms in the office, at the agent's office.
Q. What was the condition of the platform at the time you arrived there with reference to being lighted or not?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case, and referring to a time subsequent to the accident.
The Court: Objection sustained at this time.
Plaintiff excepts.

Q. Now do you know whether the train was late that night or not?
A. Yes sir.

Mr. Asp: Objected to as incompetent, irrelevant and immaterial.

A. The train was late.
Q. What was the nature of the injury, if you know, that the plaintiff had sustained?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial and for the further reason that the witness has not been qualified to answer the question.
Overruled. Exception.

A. Why, the foot was taken off.
Q. When you first saw him, state to the court and jury whether he was suffering or not?

74 Mr. Asp: Objected to for the same reason.
Sustained.

Q. Was the injury painful or not?

Mr. Asp: Objected to for the same reason.
Sustained.

Q. Did you hear any conversation between the conductor and any other parties, after the accident, when you got to the depot, with reference to this injury?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case, and for the reason that the question relates to a time subsequent to the accident, and not a part of the *res justa*.
Objection sustained. Plaintiff excepts.

That is all. (No cross examination.)

Callye Grigsby (Miss) is the next witness called on behalf of the plaintiff, and testifies under oath as follows.

By Mr. Hooker:

Q. Where did you live Miss Grigsby, in August 1903?
A. In Edmond.

D CLOSE IN CENTER

Q. Were you at the depot in Edmond on the night that the plaintiff Samuel Calhoun, received this injury?
A. Yes sir.
Q. What time did you go to the depot that night?
A. Why, about 11:20, about that time.
Q. Who was with you?
A. Harry Lutelle Hunt and Roy Mills.
Q. Did you get there before the train came in?
A. A short time before the train came in.
Q. About how long before?
A. About five minutes I believe.
Q. Do you know anyone else that was there at the depot that night?
A. No, I didn't, not until after the accident.
Q. Did you go into the depot before the train came in?
A. No sir.
Q. To what point did you go?
A. I stood at the north end of the platform.
75 Q. How far is that from the depot?
A. Well, a little ways; I was right by the depot.
Q. What was the condition of the platform, Miss Grigsby, as to being lighted or not?
A. It was dark.

Mr. Asp: Hold on; objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case, and not relating to the condition, as to light or otherwise, of the platform, at the time of the accident.
Overruled. Exception.

Q. Answer the question?
A. The platform was dark.
Q. Do you know whether the train was late that night or not?
A. Yes sir, it was late.
Q. How much?
A. I don't know what time it was due, but I know it got in about 11:30.
Q. About 11:30?
A. About that time, yes sir.
Q. Did you see this injury?
A. No sir, it was dark; I could not see the accident until it was over.

The Court: Do you mean,—what do you mean?
Mr. Hooker: I mean, did she see the accident?

A. No sir.
Q. How long did the train stop at Edmond that night?
A. About three minutes, I suppose.
Q. Did you see the conductor or the porter of the train that night?
A. I saw the conductor after the accident, yes sir.
Q. I mean before?
A. No sir, I don't remember of——

COPY BOUND C

Q. Did you see Mrs. Calhoun before the accident?
A. No sir.
Q. How close were you to the point where the accident happened?
A. I think the car was at the south end of the platform and I was near the——
Q. Now did Mrs. Calhoun at that time get off the train?
A. No, I didn't——
Q. Did you see the child before the accident?
A. No sir.
Q. Did you see anything on the platform in the way of trucks?
A. No, I didn't.
Q. Did you see a truck at all that night?
76 A. Why after the accident I saw——

Mr. ASP: Yes, but never mind what you saw after the accident.

Q. I mean before that, did you see any truck at all?
A. No sir.
Q. Do you know Mr. W. W. Robertson?
A. No, I don't know him.
Q. Do you know Mr. Rodkey?
A. No, I know of him.
Q. Now, after the accident, did you hear the conductor of the train make any statement in regard to it?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in this case, and relating to a time subsequent to the accident and not a part of the *res justa*.
Objection sustained.
Exception by plaintiff.

Q. What was the nature of the injury which the plaintiff in this case sustained?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case, and to the competency of the witness.
Overruled. Exception.

A. Why his foot was taken off.
The COURT: How is that?
A. His foot was cut off by the train.
Q. Do you know how long he remained in bed?
A. About four weeks.
Q. Where was he during that time?
A. He was in Edmond two weeks and then he was over here two weeks.
Q. What was the nature of the injury with reference to being painful or not?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, and not responsive to any injury in the case, and the qualification of the witness is not shown.
Objection sustained. Plaintiff excepts.

That is all.

D CLOSE IN CENTER

77 Cross-examination.

By Mr. Asp:

Q. You were at the north end of the platform prior to the time that the train came in?

A. I was.

Q. Did you remain there all the time?

A. Well, I walked up the platform a little ways when the train first came in, looking in the cars for my aunt.

Q. How far did you walk up?

A. I was in front of the pole,—walked up in front of the pole.

Q. You mean in front of the depot?

A. Yes sir.

Q. Was you right in front of the bay window?

A. No.

Q. Did you get up as far as the bay window, south?

A. No, I don't think I did.

Q. Then all the time you were there you were north of the bay window?

A. Yes sir.

Q. Well, did you start home before the train started?

A. No, I didn't start until the train had started.

Q. Had you started home at the time of the accident?

A. Yes sir.

Q. How far had you gotten on your road at the time you learned of the accident?

A. Just got to the end of the platform when I heard the child screaming.

Q. And then you went north?

A. Yes sir.

Q. And your attention was directed to the north room. Did you notice any light in the bay window of the depot?

A. No, I did not.

Q. You did not see any light?

A. If it was there it was very dim.

Q. Did you notice any light in the cars, coming out of the car windows?

A. No.

Q. You did not look to see whether there was any light in the cars?

A. I know the platform was dark.

78 Q. Well, just answer the question please?

A. I did not notice that the cars were lighted; I presume they were.

Q. You presume they were; and you waited and didn't see your aunt get off, and after the train started you started north going away?

A. Yes sir.

Q. And all the time you were on the platform north of the bay window?

A. Yes sir.

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Redirect examination.

By Mr. HOOKER:

Q. Whom did you say went to the depot with you?
A. Sofia Hunt, Lutella Hunt and Roy Mills.
Q. Do you remember whether there was any light in the bay window of the depot?
A. No, I didn't——

Mr. ASP: She said she didn't see any.

A. No, I don't remember, if it was it was very dim.

Mr. ASP: I move to strike out the last part of the answer to the last question, as being an expression of an opinion.
Overruled. Defendant excepts.

C. R. DAY, is hereupon recalled for further examination by the plaintiff.

By Mr. HOOKER:

Q. Doctor, what was the condition of the platform on the night of the accident at the time you arrived at the depot, with reference to being lighted or not?

Mr. ASP: Objected to as a repetition and as incompetent, irrelevant and immaterial, and relating to a time subsequent to the accident.
Overruled. Defendant excepts.
Mr. ASP: He didn't come there until after the accident.
The COURT: I knew he hadn't. I excluded it before because they hadn't connected it with the time of the accident.

A. The platform,—the platform wasn't lighted except what little light shone from the bay window of the operator's room.
79 Q. Was it a moon-shiney night?
A. No sir.

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case.
Overruled. Defendant excepts.

A. It was not a moon-light night.
Q. State to the jury whether the platform was dark?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness, not responsive to any issue in the case, and relating to a time subsequent to the accident.
Overruled.
—and the conditions at the time not being shown to be the same as at the time of the accident.
Overruled. Exception.

A. The platform, with the exception of the little space where the light shone out from the lamp at the operator's window, was too dark to tell who any one was.
That is all.

CLOSE IN CENTER

Recross examination.

By Mr. Asp:

Q. You were not there when the train came in?
A. No sir.
Q. You did not see the lights in the train?
A. No sir.
Q. Or whether the lights in the train shone out on the platform?
A. No sir.
Q. You were not there at the time of the accident?
A. I wasn't there.
Q. You do not know where this coach in which the plaintiff and his mother were riding with relation to the bay window, stopped for them to get off?
A. No sir, I don't know anything about that.

J. W. Howard (Dr.) is hereupon recalled to the stand by the plaintiff, and gives the following testimony under oath:

By Mr. Hooker:

Q. Doctor, what was the condition of the platform the night you went to the depot, as you have detailed a moment ago, with
80 reference to being dark or not?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in this case, and the witness has not been properly qualified to answer the question, and for the further reason that it relates to a time subsequent to the accident, and the conditions at the time this witness was on the platform were not the same as they were at the time of the accident, and for the further reason that the place of the accident was not the place where this witness was on the platform.

Objection overruled. Defendant excepts.

A. Why the only light that was on the platform was what came from the bay window of the operating room, when I got there.
Q. Was the platform dark?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial not responsive to any issue in the case, and for the same reasons stated to the last question.

Objection overruled. Exception.

A. Yes sir.

Cross-examination.

By Mr. Asp:

Q. You were not there when the accident happened?
A. No sir.
Q. You went immediately into the waiting room where the child was?
A. Yes sir.

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Q. Were you at the south part of the platform at all?
A. Well, I was on the south part of the platform.
Q. You went south of the door leading into the waiting room from the depot?
A. Yes sir.
Q. You were not there when the train came in?
A. No sir.
Q. You didn't see how the cars were lighted?
A. No sir.
Q. You don't know whether this car was lighted at all or not in which this baby and its mother were riding?
A. No sir.
Q. You did not know that it was brilliantly lighted?
81 A. No sir.
Q. You don't know what the conditions of light on the platform were at the time of the accident?
A. No sir.
The COURT: Doctor, where was the train at the time you first came to the platform?
A. The train, when I came to the platform, was down south of the platform,—down near the water-tank.
Q. About what time did you arrive there?
A. Well, I don't know, probably sometime about midnight, probably before or after; I don't know.

R. M. CAMPBELL is the next witness called to the stand by the plaintiff, and gives the following testimony under oath:—

By Mr. HOOKER:

Q. Mr. Campbell, were you at Edmond on the night of this accident?
A. Yes sir.
Q. How long had you been at the depot that night before the train arrived?
A. I think something more than half an hour.
Q. Do you know whether the train was late or not?
A. It was reported late.
Q. Where were you going?
A. I was coming to Oklahoma City, coming home.
Q. Were you in the waiting room of the depot that night before the train came?
A. Yes sir.
Q. What lights, if any, Mr. Campbell, were on the platform of the depot?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in this case, and the witness has not been properly qualified to answer the question.
Objection overruled. Defendant excepts.

A. There was no lamps alight out on the platform; there was some light from the bay window,—one little place there.

CLOSE IN CENTER

82 Q. What was the condition of the platform before the train arrived with reference to being lighted or dark?

A. It was dark except in front of that window.

Q. Do you know any one else that was down at the depot that night and on that platform?

A. Judge Fulton was there and Mrs. C. E. Vest, the stenographer, and Judge Dilley.

Q. Well, how long did the train stop at Edmond that night?

A. Why just a short time, a few minutes; I could not say how long; the passengers got off and others got on; that is, the first stop.

Q. The first stop; well, I had reference to that; what coach did you get on Mr. Campbell?

A. I boarded the day coach with the plush seats; I wasn't in the chair car, if I remember right.

Q. With reference to the smoker where was the day coach?

A. My recollection is that it was—that there was two day coaches—one chair car and this car, and that this smoker was between the chair car and this car.

Q. The one you got on?

A. Yes, I think so.

Q. Which end of the car did you board?

A. I think it was the south end of the car.

Q. Did you see Mrs. Calhoun before the accident?

A. I think I did; I saw a lady that attracted my attention; I think now it was Mrs. Calhoun; I didn't know her at the time.

Q. Where was she?

A. She was in the car at the time I noticed her and was preparing to leave the car.

Q. Do you know which door of the car she went out of?

A. I am not sure; I think she went out of the south door; I am not sure, I can't remember seeing her as she went out; I remember seeing her making preparations to go.

83 Q. Did the train stop any more after that?

A. It stopped; I heard the cry of the child, and then the train stopped for some little time, possibly 30 minutes; I can't say how long.

Q. Where was the train at the time of the second stop?

A. Why, it possibly had moved up a car length from the original stop, maybe a little further; it was down about the water tank some where, a little south of the depot.

Q. You didn't see the accident?

A. No sir.

Q. Did you see this track Mr. Campbell.

A. No sir, I didn't go out of the car after the accident.

Q. Well, before that?

A. No, I didn't see it.

Q. Did you see the child on the outside of the car?

A. No sir.

Mr. HOOKER: I believe that is all.

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Cross-examination.

By Mr. Asp:

Q. You say you got on the south end of this coach?
A. I think so.
Q. You think that was the coach in which Mrs. Calhoun was riding?
A. I think that I stepped in the coach where the lady attracted my attention, but I may have gone into the other tho'; I would not be positive about it now.
Q. Was that coach lighted?
A. Yes sir.
Q. The light in the bay window shone out upon the platform, didn't it?
A. Yes sir.
Q. Where was the south end of that coach when the train stopped the first time for the passengers to get off, with relation to that bay window?
A. I think it was south of the bay window.
Q. Might it not have been just a little bit north of the bay window?
A. It might have been; it might have been right opposite the bay window, but my recollection is that it was south of the bay window.
Q. That coach was one of these nice long coaches?
84 A. Yes sir, red plush seats.
Q. Lighted with Pintsch gas lights?
A. I don't know whether it was gas lights or electric lights; I think it was one or the other.
Q. Do you remember when you went into the coach of their being a light on the platform?
A. I don't remember any lights distinctly, except that the coach was lighted.
Q. A nicely lighted coach?
A. Yes, a nicely lighted coach; it might have been turned down; my recollection is that they were turned down some; but it was well enough lighted.
Q. A well enough lighted coach?
A. Yes sir.

M. Fulton is the next witness called to the stand and gives the following testimony under oath:

By Mr. Hooker:

Q. Judge, were you at Edmond on the night of this injury?
A. I believe it is the same injury; I was there in August that Mr. Campbell was testifying about.
Q. How long had you been at the depot that night before the train came?
A. Well, not very long, not over five or ten minutes.
Q. Do you know whether the train was late or not?
A. It was so reported.

D CLOSE IN CENTER

Q. What was the condition of the platform, Judge, before the train came, as to being lighted or dark?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in this case, and not relating to the time of the accident, and the conditions of the time referred to in the question not being the same as they were at the time of the accident.

Overruled. Exception.

85 A. The platform was dark.

Q. What lights, if any, were in and around the depot?

A. My recollection is they had a coal oil lamp,—a common ordinary glass lamp in the window along side the depot; what it was used for—I suppose it was the telegraph office, and I think that there was a glass in front and one on each side; it was a bay window; I don't know the width of it, but they are not very wide.

Q. Was that the only light you saw?

A. That is the only light; there might have been a light across the street,—in a house across the street.

Q. I mean at that time, in the depot?

A. Not in the depot.

Q. How long did the train stay there that night?

A. When the train came in Judge Dilley and I made for the car to get on, and we had to hustle pretty lively to get on before it started, and then it pulled up about the length of the car and stopped again, and then it remained, I suppose, ten or fifteen minutes.

Q. Do you remember what car you got on?

A. We got on what is called the smoking car,—the front car.

Q. The south end or the north end of the coach?

A. I think we got in at the first end we came to, that being the north end; I think that is correct.

10:45. Recess for ten minutes.

Q. Judge, did you see this accident?

A. No, I didn't see it.

Q. Where were you at the time you heard of it?

A. Just taking my seat; I sat down in the coach.

Q. Well, did you get off and go back to it?

A. After a few minutes.

Q. How far had the car gone upon which you were, from the depot platform?

86 A. I suppose it had gone—I don't know how far.

Mr. Asp: I object to the question.

Sustained.

Q. Well, did you go back to the platform?

A. Yes, I went back to the platform.

Q. What was the condition of the platform at the time you went back as to being lighted or dark?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial,

relating to a time subsequent to the accident, and the conditions surrounding not being the same.

Objection sustained.

Mr. HOOKER: If the court please this was immediately after the accident.

The COURT: I know.

Q. How long did the train stand there, Judge?

A. Do you mean before or after the accident?

Q. After the accident?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial. Overruled. Exception.

A. I suppose, maybe so, five minutes.

Q. Well, how long did it stand before the accident?

A. When it first came up?

A. Yes?

A. It came just to a stop; I might say fairly stopped, and then some one hollered "All aboard *Q*, and every body was getting on, and then when I got on,—just about the time I got in, I remember the train pulling out, and somebody getting off when I was getting on.

Q. You went back where the accident occurred, didn't you afterwards?

A. I went back as far as this bay window, I don't know where the accident occurred.

Q. You went back on the platform?

A. On the platform.

Q. When you went back did you see any obstacles or anything like that on the platform?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial and in no way relating to any issue in this case, but to a time
87 subsequent to the accident.

Overruled. Defendant excepts.

A. There were people on the platform and as I was going through them I ran up on something; I don't know what it was; I didn't stop to see what it was, but I went on around it and went on up.

Q. Did you see this truck.

A. I don't know what it was; there was something across the platform.

Q. Well, you didn't see it before you ran on it?

A. No sir, no, there was some other people standing there, and I didn't see it.

Q. Now what was the condition of the platform then at that point, as to being dark or light?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case, and relating to a time subsequent to the accident; the conditions shown by the witness having been changed and in fact had been changed.

The COURT: I don't know Mr. Hooker, why you should take the time subsequent to the accident and before the train came in, and

ignore all the time that intervened, when this witness must have known about it,—could not help but know about it,—which you have done.

Mr. HOOKER: Well, of course, he could not state if he wasn't there.

The COURT: Well, he was there on the platform; you show by this witness the condition of the platform prior to the time the train came in; now you haven't attempted to show by him its condition as to lights at the time of the accident.

Mr. HOOKER: Well, the court will bear in mind that at the time the accident occurred, he was on the train and could not see the condition of the platform.

Q. Well, what was the condition of the platform, Judge, at the time you got on the train, as to being lighted or dark?

88 Objected to for the same reasons. Overruled. Exception.

A. It was dark.

Q. Now what was its condition at the time you got back?

A. Still dark.

That is all.

Cross-examination.

By — ASP:

Q. Who was with you at the time, Judge?

A. Judge Dilley and I were together going; I don't know whether he was in front of me or I was on front of him; we were right together; Mrs. Vest was close by.

Q. And you hurried to get on the train, did you?

A. Yes sir.

Q. And just as you got on the train, the train started?

A. No, not just as I stepped on; I got up on the train and got into the coach, I think, as the train started, and we got a seat right close by the door.

Q. Did it start after you got in your seat?

A. I think it started just about the time we sat down, or just before.

Q. Or just before?

A. Yes sir.

Q. Was there a light in the smoking car?

A. Yes sir, there was a light in there.

Q. Did you see Mrs. Calhoun when you got into the smoking car?

A. No.

Q. She wasn't then on the steps of the coach just behind the smoking car?

A. Well, Mrs. Vest got on,—if my recollection is correct,—she got on this car, I stopped at this seat,—Judge Dilley and I stepped on the car and I stopped at this seat——

Q. You got on at the north end of the car?

A. Yes sir. And I watched to see that she got on—Mrs. Vest—

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and she grabbed like a man and jumped up one of these steps; there was no step or anything to climb up on——

89 Q. Well, you got out on the platform and were waiting to get in when the train came in?

A. We were already on the platform standing in a row.

Q. Where were you with relation to the bay window?

A. I think we were just south of the bay window.

Q. Might not you have been just north of it?

A. No, our car stopped just south of the bay window.

Q. And the other coach was just north of the coach you got on?

A. Yes sir.

Q. And the south end of the coach that was north of the smoker was right north of the bay window?

A. It seems to me like it was a little south of the bay window.

Q. It might have been a little north, might it not?

A. I hardly think so; that is my recollection now; of course I can't say positively; I think we were south; I am pretty sure of it.

Q. You don't think that the train,—that you sat there as much as four minutes before it pulled out?

A. Four minutes,—Oh, no, no.

Q. Were you engaged in conversation with Mr. Dilley?

A. Yes, after we got on the coach and started.

Q. Do you remember when that was Mr. Fulton?

A. The particular date, I could not tell; I was there tending to some litigation that was going on; Judge Dilley was referee in the matter, and Mr. Campbell was the attorney on the opposite side. Mrs. Vest was the stenographer; and we had been there, I guess, a day or two and came back that night; I staid at the hotel and waited for the train, and set out and walked from there over——

Q. Did you notice as the train went by, and of the cars south of the smoking car?

A. I could not say.

Q. Was there or not any baggage, mail and express cars on that train?

A. I think so.

90 Q. You think so?

A. Yes sir.

Q. Do you know how many?

A. No, I could not say.

Q. Could there have been as many as three?

A. Well, there might have been; I don't remember Mr. Asp, whether there was two or one or three, but I think there was one any way.

Q. Do you remember the platform,—that is whether it is a board platform, or cinders, or screenings or what?

A. I think it is a board platform.

Q. Do you know whether or not any part of that platform is composed of coal screenings?

A. There might have been on the far south end.

Q. Was there any on the north end, do you know?

D CLOSE IN CENTER

A. I think perhaps there was, because we struck that platform in coming there that night, at the north end.

Q. What kind of a platform was it back next to the depot?

A. I think it was a plank platform; it might have been brick, but my recollection is that it was plank.

Q. The depot was on the west side of the tracks?

A. That is right.

Q. And as the train came in it was east of the depot?

A. East of the depot and east of the platform.

Q. Do you remember whether there is a water-tank in connection with the depot?

A. Well, I think there is south from the depot.

Q. That is on the south end of the platform is it?

A. A little below the platform south,—a little further south.

Q. You don't know whether the screening continued the platform out to the tank?

A. I don't remember that.

Q. It might have been tho-?

A. It might have been.

Q. You don't know how much baggage, mail and express was to be loaded and unloaded at that time?

A. No sir, I don't know.

91 Q. How long were you at the depot prior to the time the train came in?

A. Well, my recollection is that we were there but a few minutes; probably five minutes,—maybe not that long; I think the reason for stopping that——

Q. Well, did you see an express truck there at that time?

A. An express?

Q. Yes?

A. No.

Q. Didn't you see an express truck piled up with peach baskets?

A. No, I didn't see that.

Q. You don't know how much express had to be loaded that night on the train?

A. No, I don't know a thing about that.

Q. All you know is that you got on to that train as soon as it stopped, and before you got to your seat it started?

A. That is my recollection.

Redirect examination.

By Mr. HOOKER:

Q. Judge, how long would you say that that train remained there the first time?

A. Well, I would not think it was there,—oh about the time, I guess that—I can only state just what I done and you can measure it for yourself.

Q. You have stated that——

A. It wasn't a minute.

Q. What is that?

A. It would not take me a minute to go from here down there, and jump on that train.

Q. I understood you to say that Mrs. Vest got on the car at the same place that you did?

A. Yes sir, that is to say, the two cars were coupled together and there was steps on the one car and steps on the other, and the two sets of steps are together, and she got in on the left side and I got in on the right side; that is my recollection.

92 Q. She got on to the car back of the one that you and Mr. Dilley got on?

A. Yes sir.

Q. Did you see the conductor, or brakeman or the porter around there?

A. Nobody there.

Mr. Asp:

Q. You did hear the conductor call "All aboard?"

A. Somebody said "All aboard;" I was listening for that; there was quite a crowd there, Mr. Asp.

E. S. Vaught is the next witness called to the stand by the plaintiff and gives the following testimony under oath:

By Mr. Hooker:

Q. What is your occupation?

A. Superintendent of schools.

Q. Of this city?

A. Yes sir.

Q. Were you at Edmond, Professor, the night this injury was received by this little boy?

A. Yes sir.

Q. How long had you been at the depot before the train came in?

A. More than 30 minutes.

Q. Do you know whether the train was late that night or not?

A. It was.

Q. How late?

A. Well, I think about thirty minutes late.

Q. Were you in the waiting room of the depot before the train came in?

A. Why, I was there part of the time and on the platform part of the time.

Q. On what part of the platform were you?

A. Well, I came out and walked the full length of the platform before the train came.

Q. Did you see any obstacles on the platform before the train came?

A. I saw a pair of trucks on the south end of the platform,—that is, south of the window.

Q. How close were you to those trucks, Professor?

A. I walked right by them; in fact, walked against them.

93 Q. When did you first see them?

A. I didn't see them until I got right against them.

Q. What was the condition of that platform, Professor, as to being light or dark?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case, and relating to a time remote from the accident.

Overruled. Exception.

A. It was dark, the only light was there in the office.

Q. How long,—what did you do when the train came in?

A. I got on the train immediately.

Q. Do you remember what coach you got on?

A. I do not.

Q. Did you meet any one getting off?

A. I met Mr. Robertson, W. W. Robertson, of Edmond, getting off, met him I think, just as I had gotten on the steps of the platform.

Q. Are you able to state what coach that was?

A. No, but I got on the coach just opposite or perhaps a little south of the window,—ticket window.

Q. Was it the chair car, or the one with plush seats?

A. I think it was the plush seats.

Q. Which end of the coach did you get in?

A. I got in the north end.

Q. How long did that train stay there that night, Professor, the first time?

A. Well, the train started before I took my seat.

Q. If I understand you, you got on immediately after it came in?

A. Yes sir.

Q. Have you any idea as to how long it remained?

A. Well, I should say not more than a minute, perhaps a little longer than that.

Q. You didn't see the accident?

A. No sir.

Q. You did not get off of the train after the accident happened.

A. I only looked out of the window.

That's all.

94 Cross-examination.

By Mr. Asp:

Q. There was a light in the office?

A. Yes sir.

Q. Where was that light sitting in the office?

A. The light was setting in the office next to the window from the waiting room; the reason I know that: I wanted to see what time it was, and I went to the window and looked at my watch, and the light was rather dim because I had to put my watch inside the window to see it.

Q. Well, you mean, the light was setting in the bay window, wasn't it?

A. The light was near the window or the opening of the sitting room.

Q. Oh, near the opening of the sitting room?

A. Yes sir, the waiting room.

Q. Do you know whether it remained there or not all the time?

A. Why, I could not say; it was there what time I saw it; I didn't see it at any other point.

Q. The bay window had three windows?

A. Yes sir.

Q. So that a lamp setting in the bay window would shine out on the platform north, south and east.

—. ——.

Q. The bay window being on the east side of the depot?

A. Yes sir; I think, tho', that the light was setting there——

Q. Do not volunteer anything, please, Professor. The light sitting there in the bay window would shine out in that way?

A. Yes, if it was sitting there it would.

Q. And you say you got on the coach on the train that stopped right at the bay window, or a little——

A. — or a little south of it.

Q. That is, you mean, that the end of the coach was a little south of it?

A. The north end of it was a little south of it, yes.

Q. Are you sure you got on the north end of that coach?

95 A. Yes sir.

Q. Then you got into the smoking car, didn't you?

A. No sir.

Q. And the north end of the coach was a little south of the bay window?

A. Yes sir.

Q. Now, as a matter of fact, wasn't the north end of the smoker and the south end of that coach right in close proximity to that bay window?

A. No sir.

Q. That is not a fact?

A. No sir.

Q. That is your best recollection of it?

A. Yes sir.

Q. Where were you when the train came in?

A. I was just outside of the door.

Q. The door was just south of the bay window?

A. No sir, it was just north.

Q. Just north. Are there two doors there in the depot, one north and one south of the depot?

A. If there was one south, I didn't know it; I wasn't in that.

Q. And you got out and how far did you walk to get on the coach?

A. Well, it is a little hard to say; I just walked by the bay window perhaps 20 feet. It might have been a little more than that.

Q. And got on the train?

A. Yes sir.

Q. And it is not possible for you to be mistaken about that; that you got on the north end of that coach?

A. I did get on the north end of that coach.

Q. It is not possible for you to be mistaken?

A. No sir.

Q. How was the coach lighted?

A. Well, I did not pay any attention to the kind of lights.

Q. Was it lighted at all?

A. Yes sir.

Q. It was one of these long coaches wasn't it?

A. Why it was an ordinary coach; I don't know whether it was of extra length or not.

Q. Do you remember whether it was lighted with Pintsch gas?

A. I think it was; I am not positive about that.

96 Q. You say now, that it was just an ordinary coach; it wasn't one of these nice long coaches?

A. I say it was of ordinary length; there was nothing unusual in the size; as well as I remember it had plush seats; it wasn't the chair car; it was a nice car.

Q. Did you notice how many cars were on the train?

A. I did not.

Q. Did you notice whether there were any baggage, mail and express cars in that train?

A. I did not.

Q. Did you live at Edmond at that time?

A. I did not.

A. I did not.

Q. You lived here at the time?

A. Yes sir.

Q. The track is on the east side of the platform, is it?

A. Yes sir.

Q. The depot is west of the track?

A. Yes sir.

Q. Is there a water tank there?

A. There is a water-tank on the south of the depot.

Q. How far from the depot?

A. I don't remember; some little distance.

Q. Do you know where this accident occurred of your own knowledge, Professor?

A. Well, I heard the child screaming, and I looked out of the window; from my own impression and what I heard, I would think it was near the south end of the platform.

Q. As you got on that train did you see Mrs. Calhoun?

A. No sir, I think not.

Q. Did you see a woman with a little child?

A. I am not sure that I did.

Q. Did you see a lady get up and hear her ask, "What station is this"?

A. I did not.

Q. Did you get on the train immediately after it came in?

A. Yes sir.

COPY BOUND C

Q. Just as soon as you could walk from the door to the train, you got on?

A. Well, I think I was standing just outside the door, perhaps three or four feet, and waiting for the train.

97 Q. And as quick as it stopped, you got on?

A. Yes sir.

Q. And about the time you sat down the train moved?

A. It moved before I sat down.

Q. And it moved until you heard this screaming; it kept going until you heard this screaming?

A. Yes sir.

Q. After you got on the first time and sat down,—just as soon as you were seated, or before you sat down, the train started, and it kept going until you heard the screaming of the child?

A. Well, I don't know that it had stopped when I heard the screaming of the child.

Q. Well, it kept going until that time?

A. Yes sir.

Q. And it stopped soon afterwards?

A. Well, it stopped afterwards; I can't remember distinctly——

Q. And you say that the scream and the place where the child was injured was on the south end of the platform?

A. Yes sir.

D. M. DILLEY is the next witness called to the stand by the plaintiff, and gives the following testimony under oath:—

By Mr. HOWARD:

Q. Where do you live?

A. Oklahoma City.

Q. What is your business?

A. Well, I am an attorney at law.

Q. Were you at Edmond about the night of the 23rd of August, 1903?

A. Yes sir.

Q. Do you remember the circumstance of a little child having his foot crushed there.

A. I remember that.

Q. Were you there at that time?

A. Yes sir.

Q. Who was with you, Judge?

A. Well, as I remember, Mrs. Vest, Mr. Campbell, Judge Fulton and Mr. Hunt.

Q. Where were you when the train from the north that night came into the station there?

A. Well, my recollection, I was on the platform.

98 Q. Near the depot?

A. Yes, the platform of the depot.

Q. About how long had you been there?

A. Why I could not say as to the time, but quite a little time.

Q. A few minutes?

CLOSE IN CENTER

A. Yes, more than ten minutes,—ten minutes I should think.

Q. What was the condition of the platform from the time you arrived there until the train arrived, as to whether or not it was lighted or dark?

A. There were no lights outside of the light, that I remember, in the depot,—inside.

Q. Do you remember where that light in the depot set?

A. No, I do not.

Q. What kind of a night was it, light or dark?

A. It was a dark night, not so very dark night; it was what you would call a dark night; there was no moon; it would be an ordinary star-light.

Q. Where were you on the platform when the train came in?

A. Well, I was south, as well as I remember now, of the bay window of the depot.

Q. About how far?

A. Oh, perhaps ten or fifteen feet.

Q. And how far from the railroad track?

A. Well, four or five feet, a reasonable distance.

Q. And who was with you right there?

A. Well, at that particular time, I can't recall any one just with me.

Q. —when the train pulled in?

A. No, I can't recall just who was with me at that time.

Q. What did you do when the train pulled in?

A. I got on the north end of the smoker, the smoking car.

Q. How soon after the train stopped?

A. Well, just as soon as I could; there was quite a little bunch; within a minute or two, I should judge; just as soon as I could.

99 Q. Did you go into the smoker?

A. Yes sir.

Q. What did you do then?

A. Sat down. Judge Fulton and I sat down together.

Q. How long was it after you sat down before the train started?

—. ——.

Q. Was there any delay in sitting down after you went in?

A. Not especially, no.

—. ——.

A. The train moved very soon after we sat down, or right in close proximity to it; I don't remember exactly about that.

Q. I will get you to state whether there was any delay in your getting on and sitting down, from the time the train stopped until you had got upon the train and taken your seat?

A. Why, I don't remember any special delay at any time; I simply got on as soon as I could, and it didn't seem to me that there was very much time about it.

Q. How far did you go from the door of the car to sit down?

A. Well, I should judge not more than a third of the distance,—four or five seats, until I sat down, on the west side of the car.

Q. And the train started almost immediately?

A. The train started very soon; I could not specify distinctly as

to just the time, only that it moved off in a very little time, and then it stopped again.

Q. Did you go about the platform that night before the train came?

A. I moved about in a way, yes; I was in the waiting room; I stepped in and out.

Q. And did you see distinctly up and down the platform?

A. Yes, I could see,—I could see,—I remember noticing the trucks.

Q. How near were you to the trucks?

A. Well, I was within two or three feet of it several times.

Q. And you could see them from that distance?

A. I moved about in the usual manner that people do that are waiting for trains,—just passing up and down and observing.

100 Cross-examination.

By Mr. Asp:

Q. How long were you there before the train came in?

A. Oh, I would think that we were ten minutes there; might have been longer.

Q. And you walked up and down the platform?

A. Yes, just moved about.

Q. You say you saw some trucks?

A. Well, I noticed the trucks on the platform.

Q. Do you know what an express truck is?

A. Yes sir.

Q. Did you notice an express truck?

A. I noticed the usual trucks that are about waiting for baggage.

Q. To refresh your memory, don't you remember that that express truck, that you noticed while you were walking back and forth, was loaded with peach baskets?

A. No, I don't recall that.

Q. It might have been?

A. It might have been, yes sir.

Q. Well, as the train came in, do you remember how many baggage, mail and express cars were on the train?

A. No sir.

Q. There were some.

A. There were some.

Q. That is your recollection about it?

A. Yes sir.

Q. Might have been three?

A. I can't say,—remember, the number.

Q. You can't say the number?

A. No, I could not say.

Q. They were in the train next to the engine?

A. Yes sir.

Q. And next to those cars was the smoker?

A. Yes sir.

Q. The car in which you got?

A. Yes.

Q. And you got into the north end of the smoker?
A. Yes.
Q. Did you see Mrs. Vest get on the train.
A. I did not.
Q. You don't know what car she got in?
A. I do not.
Q. Did you get on the car behind or ahead of Mr. Fulton?
A. Well, I could not state about that; I know that we both sat down together.

101 Q. Well, you went up on the platform to get into the car?
A. Yes.

Q. As you went up on the platform,—Do you know Mrs. Calhoun now?
A. I do not.
Q. Did you see any lady on the platform of the car?
A. I did not.
Q. With a little child?
A. No sir.
Q. Did you see any body get on or off the train?
A. I presume I saw people get on and off, but I don't remember any person to know——
Q. Do you know Mr. W. W. Robertson?
A. Well, I don't think I do. I might know him too, if I were to see him.
Q. As the train pulled in, do you remember seeing a man standing on the platform of the car or coach immediately back of the sleeper get off just as the car stopped, and go over towards the depot?
A. I do not.
Q. You don't remember seeing that?
A. No sir.
Q. Now where was the north end of this coach with relation to the bay window of the depot?
A. Well, it was a little south of the bay window.
Q. Where were you standing when the train came in?
A. I was standing south of the bay window.
Q. Right at the door?
A. No sir, not at the door, just on the platform, nearly the center; just a distance convenient to get on the train and be sufficiently——
Q. Well, I mean with relation to the north and south,—you were about even with the bay window?
A. My recollection is that I was south of the bay window a little, and about where the smoker would stop,—was my object.
Q. And that is where it stopped is it?
A. Well, I walked a little bit south to get to it, after the train had stopped.

102 Q. Did you notice the coach north of the sleeper?
A. Not specially?

Q. Was the smoker lighted?
A. Yes sir.
Q. Did you notice the coach north of the smoker, as to whether it was lighted or not?

COPY BOUND

A. I have no recollection of noticing.
Q. You didn't notice?
A. No sir.
Q. You didn't notice how the lights from the car window shone out on the platform?
A. No.
Q. You did not notice in what condition the platform was as to lights after the train pulled in and the lights from the car windows shone out?
A. No sir.
Q. You didn't observe that?
A. No, I didn't pay any attention to it.
Q. You did not go into the north coach at all?
A. No.
That is all.

E. S. VAUGHT is hereupon recalled for further examination by the plaintiff, and gives the following testimony under oath:—

By Mr. HOWARD:

Q. Professor, did you see any train men about there assisting the passengers on and off?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case.
Overruled. Exception.

A. Not at the point where I got on.
Q. No steps that (motioning)?
A. No sir, there was not.

Mr. ASP: Objected to for the same reasons.
Overruled. Exception.

That is all.

C. E. VEST (MRS.) is the next witness called to the stand by the plaintiff and gives the following testimony under oath:—

By Mr. HOWARD:

163 Q. You may state your name?
A. C. E. Vest.
Q. Were you at Edmond on the night of August 23rd, when the accident happened to the little boy there?
A. I don't remember the date; I was there the last of August, at the time of the accident.
Q. Who was with you?
A. Judge Fulton, Judge Dilley and Judge Campbell, and J. W. Hunt,—but I think he had gone home.
Q. How long were you at the depot before the train came, coming to Oklahoma City, that night?
A. I cannot tell.
Q. Well, about?

CLOSE IN CENTER

A. I would not like to,—state the time, but it wasn't very long.
Q. You were there before the train arrived?
A. Yes,—but I could not tell——
Q. Do you remember whether it was in sight?
A. No sir, that is my remembrance now.
Q. Where did you remain at the time you arrived until the train came in?
A. Most of the time I sat down on the edge of the platform, I sat there awhile,—most of the time.
Q. About where, from the depot?
A. Right in front of it.
Q. East?
A. Yes sir, that is up towards town.
Q. What was the condition of the platform as to whether it was light or dark?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, not relating to the time of the accident, and not responsive to any issue in the case.

Overruled.

—and the conditions not being the same as at the time of the accident.

Except.

A. My recollection is that there was just a light in the depot, but not on the platform; I don't remember of any light; I am pretty positive that there wasn't any.
Q. What kind of a night was it,—moon light, or otherwise?
A. I don't think it was moon light; I could not swear to that.
Q. Where were you when the train came in?
104 A. When the train came in I was standing on the platform; I had got up from where I was sitting and was standing on the platform.
Q. Were you standing near where Judge Fulton was standing?
A. No.
Q. Or Mr. Dilley?
A. No.
Q. Where were you from that bay window?
A. I was,—I could not say exactly,—I think,—I was down—from the door,—towards the south. The last I saw of them I think they were standing in front of the door, but I don't know where they were when the train came in.
Q. Where were you?
A. I didn't see them.
Q. Where were you?
A. When the train came in?
A. Yes?
A. I got up from where I was sitting east of the depot and prepared to get on the train.
Q. And about where did you stand with reference to this bay window in the depot?
A. I could not tell exactly; I know I was down south east of the door.

Q. That would be towards Oklahoma City?
A. Down towards Oklahoma City, yes, from the door. I could not tell exactly where I was standing.
Q. What did you do when the train came in?
A. I immediately, as is my custom, got on the train as soon as I could.
Q. Who, if any one assisted you?
A. No one.

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case.
Overruled. Exception.

Q. Did you see any train men about?
A. I did not; there were no train men there, because I know—because I had to step up a high step, and there was no one there to help us up to the platform of the car, when I got on.
Q. Well, let me ask you,—had he (the porter) been down there at all.
A. I didn't see any body down there.
105 Q. How long was it between the time that the train stopped and when you got to the steps of the car?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case.
Overruled.

A. I could not tell,——

Defendant excepts.

Q. Just state the facts,—Were you near it?
A. I was near it.
Q. How near it?
A. I think I was just right there when it stopped; I usually walk along the train, and get as close to the door as I can.
Q. And you did get on——
A. —as close to the door as I can;—and I got on right away.
Q. And at the time you got on, the step which is used to put down at the foot of the steps of the platform of the car was not there?
A. Well, I remember that, because I had to climb up.
Q. Well, did you go into the car immediately?

Mr. Asp: We move to strike out the testimony of this witness with relation to her boarding the train, as incompetent, irrelevant and immaterial, and not responsive to any issue in the case.
Overruled. Exception.

Q. What did you do when you got inside the car?
A. Found a seat.
Q. How far from the door of the car?
A. Several seats,—five or six, probably; I don't know.
Q. Did you stop on the way to the seat?
A. No, sir, I did not.
Q. Have you learned to know Mrs. Calhoun since then?

A. No, I don't think I ever saw the lady before.
Q. Did you see a woman there that night?
A. Yes sir, I saw one.
Q. Dressed in black, with a little boy?
A. With a little boy, yes, with a black veil.
Q. Now what was she doing when you went in there?
A. When I went into the car, I didn't pay any attention to anybody until I got to my seat, and then I noticed the woman in the car.

106 Q. What was she doing when you noticed her then?
A. The first I noticed she was preparing to leave the car.
Q. Well, how was she acting, hastily or slowly?
A. She was acting hastily; as I understood it; I think she had just then understood that that was——

Mr. Asp: Now never mind, what you understood——

Q. I asked you whether she was acting hastily or slowly?
A. She was acting hastily.
Q. And what was she doing?
A. Taking up her things to get out.
Q. And how far was she from the door of the car, or from you?
A. I can't remember all those little details; as near as I can recollect she was in the seat this way, and she passed up the isle, one or two seats in front of me and got something,—whether it was the child or a package, I could not tell.
Q. What did she do?
A. She went out.
Q. How did she move, rapidly or slowly?
A. She moved rapidly; I think somebody carried the child for her; I am not positive about that.
Q. What did you see of her after that?
A. I didn't see any more of her.
Q. You did not see the accident?
A. No sir.
Q. You don't know anything about that?
A. Nothing at all; it seems I heard a scream out there; something like a scream.
Q. State whether there was any delay in her actions or any sluggishness in her efforts to get off the train?
A. No, I do not think so.

Cross-examination.

By Mr. Asp:

Q. Was there any one with you that got on the car?
A. When I did?
Q. Yes?
A. No one got on but myself there.
Q. Was there any one that was in the seat that you sat down in?

107 A. I won't be positive about that; I rather think that there was; I am not sure.

COPY BOUND

Q. Do you recollect now who it was?
A. Oh no, I didn't know anybody there at all.
Q. None of the friends who were with you at Edmond were in the seat?
A. No.
Q. None of them rode in the seat with you?
A. No, I think not; I am satisfied that they did not.
Q. You say that the train started about the time that you sat down?
A. No, I didn't say that.
Q. I understood you to say that.
A. No, I said that she started to get up and gather up her belongings——
Q. She started to gather up her belongings and started for the door?
A. Yes, hastily.
Q. Do you remember whether the persons that was with her was a lady or a gentleman?
A. Why, the one that went out with her, do you mean?
Q. Yes?
A. I think a gentleman started to carry the child out to the door, but I do not think that he was with her, but that he just carried it out to help her; that was my idea of it, when I saw them start.
Q. Then, it might be that no one carried the child to the door?
A. It might be; I am not positive.
Q. She may have led the child along?
A. No, I think not; I am not right positive; I think that this man carried the child.
Q. Was there any one leading the child at all, going towards the door?
A. Not that I noticed; when they started they were back of me and I glanced around at them starting, and then turned my face the other way.
Q. Well, which way were you facing?
A. Well, I was facing.—I got on the car, and I think I came up, and my face was turned towards the north, I think——
108 Q. You think your face was towards the north?
A. I think so.
Q. Do you remember what kind of a coach that was?
A. Why, my recollection is that it was one of these double length——
Q. Double length coaches?
A. Yes sir.
Q. With a partition in the center of it.—no not exactly a partition either, but a sort of a division there in the center, going up to the top of the car——
A. Well, I think it was pretty near twice as long as an ordinary coach.
Q. Now, you got in at the south end of that car?
A. Yes sir.
Q. And how far back did you go; did you go to the center of the car?

CLOSE IN CENTER

A. No, I didn't go to the center of the car.
Q. Which side of the coach did you sit down on, did you say?
A. I sat down on the right hand side I think.
The COURT: As you went back?
A. As I went back.
Q. Well, would that be the east side or the west side?
A. That would be the east side.
Q. You sat down on the east side of the coach?
A. Yes sir.
Q. Facing towards the north of the coach,—the north end?
A. I think so, yes,—yes, that must have been——
Q. And after she passed you going towards the door, in order to see her, you say that you turned and looked at her?
A. Yes sir.
Q. Well, do you remember now that you did turn around and look at her as she went past you?
A. I glanced back, yes; I was attracted by her appearance and I looked at her.
Q. And the fact that she was in mourning, did that attract you?
A. Yes, and she was a nice appearing lady; I like to look at pretty women.
Q. And did you notice the boy also?
A. I noticed the child,—not particularly.
Q. And had she disappeared from the door, when you noticed that the train had started?
109 A. She had disappeared from my view; I did not follow her movements to the door.
Q. You did not follow her movements to the door?
A. No.
Q. Do you know how long it was after she had passed you until the train started?
A. Why, it could not have been very long, because it was just a short distance until I heard the screaming and turned around, and the train was moving,—I think the train moved almost—in just a little while,—it was moving at the time the screaming occurred.
Q. It was moving at that time?
A. Yes sir.
Q. And probably had been moving for some little time before?
A. It could not have been much time before, no.
Q. You do not know whether or not when she got to the platform she gave the child to some one?
A. I know nothing about that, no.
Q. You do not know that she gave the boy to W. W. Robertson?
A. No, I don't know anything about that.
Q. And you did not know that he gave it to some one else, who set it safely down on the platform?
A. No, I didn't see anything at all about that.
Q. And you do not know whether the train was moving when she handed the child off the train?
A. I don't know when she handed the child or whether she handed it.

Q. You don't know whether she did or not?
A. No sir, I don't know anything about that.
Q. Mrs. Vest, the south end of the coach that you got on, at the time you got on, was just a little south of the bay window of the depot, was it not?
A. It was along about there, yes sir.
Q. Do you remember what kind of lights the coach had?
A. No, I don't remember.
110 Q. Do you remember whether it was the Pintsch gas light or electric light?
A. No.
Q. You do not remember anything about that?
A. No, I don't.
Q. You could not see out on the platform, to see the condition of the platform as to light in and around that bay window, and the end of the car, after the train stopped?
A. After the accident?
Q. No, when you got on?
A. I didn't look out.
Q. You don't know then, what the condition of the platform was in and around the end of this car after it stopped?
A. After it stopped—no, not after it stopped.
Q. I mean after it stopped at the time you got on?
A. I don't think that there was any light there, only from the car; my recollection is——
Q. There was a light in the bay window?
A. A light in the bay window.
Q. Do you remember now whether, just as you went up the steps there was a light right in the end, one of these Pin-sch lights, right in the end of the platform.
A. I don't recollect seeing it; I didn't pay any attention to it.
Q. You do not have any definite recollection so far as the light in the car was concerned?
A. There was a light in the car, the car was lighted.
Q. You could see the light in the end of the car?
A. I could see that light in the car, yes sir.
Q. But, you don't know whether there was a light up above there, right in the end of the car, do you?
A. No, I don't recollect that there was.

Redirect examination.

By Mr. HOWARD:

Q. About how long did that train stand there?
A. It did not stand there only just a very short time.
Q. It had not got any time to spare.

Mr. ASP: We object to the form of the question. Question withdrawn.
111 Mr. ASP: We move to strike out the last question.
The COURT: She did not answer it.

12 M. Court adjourns until 1:30 P. M.

1:30 P. M. Same day. Court convenes pursuant to adjournment, and this trial is proceeded with as follows:

STEVE HAYNES is the next witness called to the stand by the plaintiff and gives the following testimony under oath:

By Mr. HOOKER:

Q. Where do you live, Mr. Haynes?

A. I live in Oklahoma City at present.

Q. Where did you live in August 1903?

A. I lived on a farm two miles northwest of Edmond.

Q. Were you present at the depot in Edmond the night that the plaintiff in this case received this accident?

A. Yes sir.

Q. Were you at the depot before the train came in?

A. Yes sir.

Q. About how long before the train came in was it that you went to the depot?

A. Oh, about four or five minutes.

Q. Who was with you?

A. Mrs. Grigsby, Mr. Mayall and Miss Hunt.

Q. What part of the platform or the depot did you and these parties stay while you were waiting for the train?

A. North from the bay window.

Q. How far from the bay window?

A. Well, we were at the bay window and backwards and forwards north of there.

Q. Did you go into the waiting room of the depot?

A. No sir.

Q. Did you go south of the bay window of the depot?

A. Not before the train came in.

Q. What was the condition of the platform before the train came in as to being lighted or dark?

A. It was dark.

Mr. ASP: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case, and referring to
112 a time not connected with the accident, and a place not connected with the accident.

Overruled. Exception.

Q. Now you can answer the question?

A. It was dark.

Q. Do you remember whether the train was on time or not?

A. It was reported twenty-five minutes late.

Q. Had you been to the depot at any time previous to that time waiting for that particular train to come in?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, and having no relation whatever with any of the issues in this case.

Overruled. Defendant excepts.

A. I hardly ever went down there without it was to meet friends or something.

Q. Now, you had been down there?

A. Yes sir.

Q. I will ask you to state whether this train, upon this occasion, stopped at its usual stopping place that night?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case, and for the reason that the witness has not been properly qualified to answer the question.

Objection sustained. Plaintiff excepts.

Q. Do you know where the day coach of this train stopped that night with reference to the bay window of the depot?

Same objection and the qualification of the witness not having been shown. Overruled. Exception.

A. The day coach, the north end of it, was about even with the bay window, if not a little bit south,—that was, the north end of it.

Q. The north end of the day coach?

A. Yes sir.

Q. Well, how long did the train remain at Edmond at its first stop that night?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case, and the qualifi-
113 cation of the witness not having been shown.

Overruled. Exception.

A. Two or three minutes, not over three minutes.

Q. Did it stop as long as it usually does?

Mr. Asp: The same objection, and the competency of the witness is not shown.

Objection sustained. Plaintiff excepts.

Q. Did you see the truck Mr. Haynes over which this young man fell?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case, and not connected in any way with the accident.

Overruled. Exception.

A. I saw it after the accident happened.

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, not responsive to the question, and relating to a time not connected with the accident.

Overruled. Exception.

Mr. Asp: We move to strike the answer out.

Overruled. Except.

Q. Did you see the accident.

A. No sir.

Q. Did you see the child before the accident?

A. No sir.

Q. Did you see Mrs. Calhoun before the accident?
A. No sir.

Mr. HOOKER: That is all.

Cross-examination.

By Mr. ASP:

Q. Did you see the train start?
A. Which, the first or the last time?
Q. The first time?
A. Yes sir.
Q. Where were you when the train started?
A. I was on the north end of the platform.
Q. What did you do when the train started?
A. I started to my team to go home.
Q. Did you come back any more?
A. Yes sir.
Q. Well, you were there on the platform, were you, with these young ladies that you have mentioned?
A. Yes sir.
Q. Talking to them?
A. We were looking for Mrs. Calhoun.
Q. Were you talking to them?
A. No sir.
114 Q. Didn't talk to them at all?
A. Why, yes, before the train came in.
Q. Were you engaged in conversation with them?
A. Yes, not while the train was standing there, tho'.
Q. While the train was standing there, where did you remain?
A. We were walking up and down the platform looking for Mrs. Calhoun.
Q. From the bay window, north?
A. Yes.
Q. You did not get south of the bay window?
A. No sir, not after the train pulled out.
Q. You did not see Mrs. Calhoun?
A. Not until she got off up above.
Q. You did not see her hand the baby off?
A. No sir.
Q. And did not see Mr. Robertson take the baby and set it down on the platform?
A. No sir.
Q. You didn't see him give it to Walter Robertson?
A. No sir.
Q. And you did not see Walter give it to Carl Jones?
A. No sir.
Q. And you did not see Carl Jones run up the platform with the baby?
A. No sir.
Q. What were you doing on the platform?
A. We started back to the team——

Q. Who did?
A. Mrs. Grigsby and myself and Miss Hunt; we had brought the team down there to take Mrs. Calhoun back to the house.
Q. Who started with you to the team?
A. Mrs. Grigsby.
Q. Who else?
A. That is all.
Q. Just you and Mrs. Grigsby started back to the train, as quick as the train started to pull up?
A. Yes sir.
Q. You never saw Mrs. Calhoun?
A. No sir.
Q. You never saw the baby?
A. No sir.
Q. And you never saw them put the baby off?
A. No.
Q. And you never saw Mr. Robertson take it?
A. No.
115 Q. Or saw him give it to the boy?
A. No sir.
Q. Just as quick as it started you turned and went off?
A. Started to the team?

Mr. Asp: That is all.

I. W. Rodkey is the next witness called to the stand by the plaintiff and gives the following testimony under oath:—

By Mr. Hooker:

Q. Mr. Rodkey, where did you live in August, 1903?
A. Edmond.
Q. Where do you live now?
A. Edmond.
Q. Were you at Edmond on the night that the plaintiff in this case received the accident?
A. I came in on the train that night.
Q. Where did you take that train.
A. At Guthrie.
Q. Coming to what point?
A. To Edmond.
Q. Were you traveling on a ticket or a pass?
A. Yes sir, traveling on a ticket.
Q. Did you see Mrs. Calhoun on that train that night?
A. Yes sir, I seen her.
Q. Were you personally acquainted with her then?
A. No sir.
Q. Where were you seated in that coach, if at all, Mr. Rodkey?
A. Two or three seats north of the arch.
Q. Where was that bridge?
A. In the center of the car.
Q. On which side of the train were you seated?
A. On the east side.

Q. About how far from the arch?
A. Two or three seats north of the arch.
Q. Where was Mrs. Calhoun with reference to the place where you were seated?
A. Well, she was three or four seats south of the arch on the west side.
Q. Do you remember where you were when you first noticed her?
A. I just noticed her as I walked out.
Q. Walked out; at what point was the train at that time?
116 A. At Edmond,—just approaching Edmond.
Q. How did you know that the train was approaching Edmond?
A. I seen the lights of the town.
Q. Was Mrs. Calhoun asleep?
A. No, I think not.
Q. Did you notice her before then?
A. No, I just noticed the little boy.
Q. Did you notice the boy before this?
A. No sir, not before I walked out.
Q. Did you get a drink of water between Guthrie and Edmond?
A. I got a drink of water just as I got up, when we were approaching Edmond.
Q. Where was that water?
Q. Where was that water?
A. At the south end of the car.
Q. On which side?
A. The west side is my recollection.
Q. Now in going from the place where you were sitting in the car to the water tank, did you have to pass by Mrs. Calhoun and the child?
A. Yes sir.
Q. You noticed them at that time?
A. Yes sir.
Q. Where was the train then?
A. Well, just coming into the station.
Q. Now after you got your drink of water where did you go then?
A. I got off the train.
Q. Well, you went out on to the platform first didn't you?
A. Yes sir.
Q. Where was the train when you got out on the platform?
A. Right at the depot.—Right at the north end of the depot.
Q. At what point?
A. At Edmond.
Q. Well, now, had the train stopped before you got on to the platform of the car or not?
A. Yes, it had stopped.
Q. Had you heard the station announced in that car, up to that time?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial

and not responsive to any issue in this case, and the qualifi-
117 cation of the witness has not been shown, and the question as to whether or not the station was called is so far remote that it could not, under the statement of counsel and the allegations of the petition have contributed to the injury.

Overruled. Exception.

And also as calling for a conclusion of the witness.

Overruled. Exception.

A. I did not.

Q. Now was that station called or announced in that car at that time or before this?

Mr. Asp: We object to the form of the question as incompetent irrelevant and immaterial, and as calling for a conclusion of the witness, and as calling for the opinion of the witness, which is not admissible.

Overruled. Exception.

A. I didn't hear it called.

Q. If it had have been announced in the car, were you in a position so that you could have heard it.

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case, and calling for a conclusion of the witness, and for a conclusion of fact, of which the jury are the sole judges.

Objection sustained.

Q. Which end of the car did you get off of?

A. The south end.

Q. With reference to the bay window of the depot, where did the south end of the car stop?

A. About the north edge of the depot.

Q. Right at the north edge of the depot?

A. Yes sir.

Q. Did you see anybody else at that time Mr. Rodkey, after you got off of the car, that you knew?

A. No, I did not, at that time.

Q. Do you know Mr. W. W. Robertson?

(Interruption.)

Q. Who was around about the platform of [illegible] car when you got off, Mr. Rodkey?

A. I do not just remember who all was around there; there was a good many around there, but I didn't recognize any of
118 them when I first got off.

Q. Was anyone on the platform of the car with you?

A. No, they were just all getting off the coach.

Q. What was the condition of the platform around the depot as to being light or dark when you got off the car?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case.

Overruled. Exception.

A. Pretty dark.

Q. Prior to the arrival of the train at Edmond did you see the conductor or the porter in the coach where you were?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case, calling for a conclusion of the witness, and the qualification of the witness has not properly been shown.

Overruled. Exception.

A. I didn't notice any.

Q. Do you remember hearing the train whistle for Edmond that night?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial not responsive to any issue in the case.

Overruled. Exception.

A. I don't remember.

A. *I don't remember.*

Q. Well, from the time that the train was approaching Edmond up until the train arrived at Edmond, did you see the conductor or porter or brakeman in that coach, or around about there?

Mr. Asp: The same objection, and the qualifications of the witness to testify in regard to that matter not having been shown.

Overruled. Exception.

A. I don't remember of seeing any.

Q. Where was this coach in which you were riding with reference to the smoker on that train?

A. Right behind the smoker.

Q. When you got off of the platform of the car, where did you go?

119 A. I stopped about even with the bay window, south.

Q. How far from the train?

A. Oh, about six feet.

Q. When did you first see Mrs. Calhoun after you got off the platform, if at all?

A. Saw her on the platform,—probably on the first step.

Q. Did you see the plaintiff, Samuel Calhoun, at that time?

A. Yes, they set the child right off, right opposite me there,—close by me.

Q. Do you know who it was that set the child off of the car platform?

A. Not right at that time, I did not.

Q. Did you see the party who did it?

A. I saw him, yes sir.

Q. Did you hear Mrs. Calhoun make any statement at that time to the party who was setting the child off of the car?

A. No sir, I did not.

Q. Well, why were you not able to tell who that party was?

A. It was pretty dark and I could not see him.

Q. Are you well acquainted with Mr. Robertson?

A. Fairly well.

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Q. Mow close were you to him at the time that he handed the child off of the car platform?
A. About six or seven feet.
Q. Do you know to whom he handed it?
A. No, I don't.
Q. Did you see the party to whom it was handed?
A. He was standing up close by me there.
Q. How close to you?
A. Oh, probably two feet.
Q. Are you acquainted with Mr. Robertson's son?
A. Yes sir.
Q. You did not recognize him as the party to whom the child was handed, did you?
A. No sir.
Q. Well, now, what was done with the child after it was handed down on to the platform *on to the platform* of the depot, or rather, from the car platform?
A. The boy picked the child up and tried to put it back on the train again.
Q. What boy?
120 A. Mr. Robertson's boy.
Q. Mr. Robertson's boy picked the child up?
A. Yes sir.
Q. What did he do with it?
A. He ran down the platform with it.
Q. Now, do you know whether it was Robertson's boy or some other boy?
A. No, it was Robertson's boy.
Q. Do you know to whom Robertson's boy handed the child, if anyone?
A. He told me when he returned that he had handed the child to Carl Jones; I asked him if he got the child on, and he said no, but that Carl Jones did.
Q. Now did you see Carl Jones attempting to put the child on the train?
A. No, I did not.
Q. Did you see any trucks around about there, Mr. Rodkey?
A. Not at that time, I didn't.
Q. When did you first see the truck?
A. When I went down after the accident.
Q. Did you see Mrs. Calhoun while this Jones boy was trying to put the child back on the train.
A. No sir, the train was too far south for me to see him.
Q. Did you hear Mrs. Calhoun make any statement to keep off the child or to put it back on the car platform?
A. I think she hollered something but I didn't recognize what she said.
Q. You don't know what she said?
A. No.
Q. Where was she standing at the time you heard her holler something.

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A. I think she was on the upper step of the platform; that is my recollection.

Q. Well, now, when you first saw those trucks, how long after the accident was that?

A. That was right immediately,—it wasn't more than about a minute.

Q. What first attracted your attention to the accident?

A. I heard the child cry.

Q. Do you know who picked the child up?

A. I picked the child up and set it on the truck.

121 Q. Now where were those trucks situated at that time?

A. Well, they was about three or four feet from the side of the train.

Q. Three or four feet from the side of the train?

A. Yes sir.

Q. Now, with reference to the wooden part of the platform, where were the trucks located?

A. Why, I think part of the trucks stood on the wooden part of the platform.

Q. At which end of the platform?

A. The south end.

Q. Now describe those trucks, Mr. Rodkey, to the jury.

A. Well, it was a baggage truck sitting there.

Q. Give the size.

A. Well, it was a good sized truck, probably eight feet long, and about two feet high, I suppose.

Q. Two feet high and eight feet long and how wide?

A. Oh, about two or two and a half feet wide, I guess.

Q. Now how many wheels or legs did that truck have?

A. It had two wheels and a pony wheel at each end.

Q. What position was it in at the time you saw it immediately after the accident?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case, and not being shown to have been in the same position that it was at the time that Carl Jones ran into the truck.

Overruled. Exception by defendant.

A. The truck stood kind of inclining a little bit——

Q. Describe the angle—With reference to the railroad track—describe the position of the truck.

A. Well, I should judge from the north end of the truck was about three feet from the—two or three feet from the railroad and the south end would be three or four feet from the railroad.

Q. Then it was sitting north east and south west after the accident?

A. Yes sir.

Q. The railroad runs virtually north and south?

A. Yes sir.

122 Q. Was the child conscious at the time you picked him up?

A. Now, I don't know; it was screaming all it could at the time I picked it up.

Q. Do you know whether it was conscious or not?
A. I could not tell.
Q. What injury had it received, if any?
A. He had his foot cut off.
Q. Was the foot cut entirely off?
A. I think so.
Q. What is your best recollection about that?

Mr. Asp: Objected to as immaterial; there is no conflict on that proposition at all, absolutely none.
Overruled. Exception.

A. Well, I think its foot was cut off; the foot was cut plum off, and its little stocking, or something, dropped down when I set it up there.
Q. Do you remember whether that train stopped between Guthrie and Edmond that night?
A. It did not.
Q. Do you remember whether it stopped at Seward or not?
A. No, it did not stop, that is my recollection, it didn't stop.

Cross-examination.

By Mr. Asp:

Q. You got on the car at Guthrie?
A. Yes sir.
Q. You rode from Guthrie to Edmond?
A. Yes sir.
Q. This was one of these long coaches?
A. Yes sir.
Q. With an arch in the center of it?
A. Yes sir.
Q. Longer than the usual coaches?
A. Yes sir.
Q. Do you remember how that coach was lighted?
A. Why, fairly well, I think.
Q. Do you remember what kind of lamps?
A. I do not.
Q. Don't you remember whether or not it was *pinched* light gas lamps?
A. I don't remember.
Q. Do you know what the *pinched* gas light is; did you ever notice that on the cars?
123 A. I have never paid any particular attention to the lights.
Q. Do you know whether or not it was lighted by electricity?
A. I could not say.
Q. It might have been lighted by electricity. Do you know how many lights there were on the train?
A. I do not.
Q. Do you know whether or not there was one of these lights in the vestibule, right on the platform of the car where the steps go down, for the purpose of getting on and off?
A. I didn't notice it.

Q. You say the train did not stop between Guthrie and Edmond, as you remember?
A. No sir.
Q. That is your best judgment about it?
A. Yes sir.
Q. When it got to Edmond, the south end of that coach that you were riding in stopped north of the bay window of the depot, did it?
A. Yes sir.
Q. And the south end of that coach was joined on to the north end of the smoker?
A. That is my recollection, yes.
Q. Do you remember what other cars there were in the train ahead of the smoker?
A. I do not.
Q. Do you remember whether or not there were any baggage, mail or express cars?
A. No sir.
Q. Did you notice?
A. I didn't notice.
Q. You got off and got on to the platform north of the bay window?
A. Yes sir.
Q. Did you notice whether the lights shone out of the coach on to platform?
A. I think there was some little light, yes sir.
Q. Do you remember whether the light shone out of the bay window of the depot on to the platform?
A. Yes, there was some light in the depot.
Q. In the bay window of the depot?
A. Yes sir.
Q. Shining out upon the platform?
A. Yes sir.
Q. You got off on to the platform?
A. Yes sir.
Q. And stopped there?
A. No, I walked down a little ways after I got off.
Q. Down where do you mean?
A. Down towards the bay window.
124 Q. How near did you get to the bay window?
A. Right pretty near opposite the bay window.
Q. And you saw Mrs. Calhoun come down off from the steps——
A. Well, she was on the platform, coming, on the first step.
Q. Where was the boy at that time?
A. They had set the boy off right beside me there.
Q. Who had set the boy off?
A. Well, I learned afterwards that it was W. W. Robertson.
Q. When she handed the baby to W. W. Robertson, had the train started?
A. Oh, yes, it was moving; it moved from the north end down to the bay window.

Q. The train had gone from the north end of the depot down to opposite the bay window when Mr. Robertson took the baby?
A. Yes sir.
Q. Now what did he do with the baby when he took it?
A. Set it down on the platform.
Q. Well, how far did he go with the baby when he set it down?
A. About five feet, I should think.
Q. You do not know who he gave it to?
A. Well, he just set it down there; I think his boy took charge of it.
Q. Did you hear what Mrs. Calhoun said to him when she handed him the baby?
A. I did not.
Q. Did you hear what he said to his boy when he placed the baby in his care?
A. No, I did not.
Q. Then you say that you heard Mrs. Calhoun say something?
A. I heard her holler something, yes sir.
Q. But you could not understand what it was?
A. No sir.
Q. Did you say anything to young Calhoun about the baby?
A. No, I think he came back there after he tried to——
Q. Did you tell him to take the baby and try to put it on the train?
A. No sir, I did not.
125 Q. You are sure about that?
A. You bet I am.
Q. And you did not see Carl Jones have the baby at all?
A. No sir.
Q. Do you know where this truck was standing,—how far it was from the bay window?
A. It was quite a litle distance.
Q. Something over 100 feet, is it not?
A. Well, I should judge so.
Q. Probably 125 or 30 feet?
A. Something like that.
Q. Then this Robertson boy and Jones together carried that baby down along side of the train 125 or 30 feet before they reached the truck?
A. Yes sir.
Q. That is a fact, is it?
A. Yes sir.
Q. The train, as it started out, increased its speed, did it not?
A. Yes sir.
Q. Kept going faster and faster all the time?
A. Yes sir.
Q. Do you know why Mrs. Calhoun did not get off?
Q. —after she handed the baby to Mr. Robertson?
A. The train was going too fast for her to get off.
Q. Did you hear her say anything about that?

A. I did not.

Q. Did you think that the train was going too fast for a passenger to get on or off at that time?

A. Well, I could have got off, but I do not think that a lady could have got off.

Q. —or for a boy like the plaintiff to get off?

A. Oh no, he could not get off.

Q. You say that it was going too fast for a woman to get off with safety when the train passed the bay window?

A. Yes sir.

Q. She was then standing on the steps of the platform, or had she got off upon the platform?

A. Well, she might be on the top step, and possibly on the platform I could not say.

Q. Did you see her there?

A. Yes sir.

Q. Sure of the fact that you saw her there?

A. Yes sir.

126 Q. And you saw her give that baby to somebody?

A. Yes sir.

Q. And you have since learned that it was Mr. Robertson?

A. Yes sir.

Q. And you were standing back on the platform?

A. Of the depot, yes sir.

Q. And she saw that the train was moving, did she not?

A. I suppose so.

Q. She could not help knowing it, could she?

A. She could certainly feel the motion of the train.

Q. Well, she could not help but see the objects that were standing on the platform?

A. Yes sir, I suppose so.

Q. Mr. Robertson was not an employé of the company?

A. I think not.

Q. His son, Walter M. Robertson, was not an employé of the company, was he?

A. I think not.

Q. Did you know Carl Jones at that time?

A. Yes sir.

Q. He was not an employé of the company, was he?

A. Well, he was a checker on the train.

Q. Checker for whom?

A. For the Oklahoma Bus and Transfer Company.

Q. That is an independent company to the railroad company, the bus and baggage company of Oklahoma City?

A. I don't suppose it has anything to do with the railroad company.

Q. Well, that is your understanding that it was not?

A. Yes sir.

Q. How long after you got off was it before Mrs. Calhoun appeared on the steps of the platform of that car, with the plaintiff?

A. Well, it must have been about four minutes, I should think, when the train began to start—to move.

Q. Four minutes you think?

A. From the time I got off.

Q. It was four minutes then from the time you got off until you saw Mrs. Calhoun upon the platform of that car with the plaintiff—the baby?

127 A. Yes, something like that.

Q. That is your best judgment, that it was about four minutes?

A. Yes sir, something like that.

Q. Now what were you doing there that four minutes after you got off?

A. Well, I was just standing there waiting, because the crossing was right down there, and I was going home then——

Q. You lived on the west side of the track?

A. I lived on the east side of the track.

Q. Oh, yes, I beg your pardon, the train was east of you, and you lived on the east side of the track?

A. Yes sir.

Q. The track on which the train came in was on the east side of the depot?

A. Yes sir.

Q. (Producing plat) Mr. Rodkey, you are familiar with the conditions down there are you?

A. Yes sir.

Q. Please examine this plat: does that show that it is a pretty correct plat of the situation?

A. I think so, yes sir.

Q. This is the bay window?

A. Yes sir.

Q. And this is the depot?

A. Yes sir.

Q. Now is there a door north of the bay window?

A. Yes sir.

Q. And another one south of the bay window?

A. Yes sir, the baggage door is south.

Q. And the waiting room is north?

A. Yes sir.

Q. And the door into the waiting room is north of the bay window?

A. Yes sir.

Q. Now there is a part of the platform down along next to the——

A. Yes, there is the plank.

Q. Did that reach clear back of the depot, do you know?

A. No sir, just a few feet.

Q. And between that and the depot was what?—screenings?

A. Screenings or something.

Q. At the south end of the plank platform, and the screenings platform what was there there?

128 A. Cinders is my recollection.

Q. Now that truck that you found was down here on the cinders, with one end projecting over the board platform of the cinder platform?

A. Yes sir, about in here is my recollection of where the track was setting.

Q. That is about 125 or 30 feet from the bay window, that place where the truck was setting, was it?

A. I don't know but I should judge it to be about that far.

Q. That is your best recollection?

A. Yes sir.

Mr. Asp: It is hereby stipulated and agreed by and between the parties hereto that the plat prepared by H. W. Wagner hereto attached of the station of Edmond, Oklahoma County, Oklahoma Territory showing the dimensions thereon is a correct plat of such station of Edmond, and that the dimensions marked thereon are the correct dimensions; that said plat is drawn to a scale of one inch to the twenty feet, and is a correct plat showing the station of Edmond, and its surroundings, depot, platform and the tracks, as they existed on the 24th day of August, 1903, the time when the accident complained of in this action occurred, and may be used in evidence by either party to this action, without objection by either party. This is signed by Sam Hooker, for Samuel Calhoun, and by the Atchison, Topeka & Santa Fe Railroad Company, by Henry E. Asp, its attorney.

The above stipulation is offered and admitted as a part of the cross examination of the above witness. And said stipulation is marked "Exhibit B" and made a part of and is attached to the plat heretofore referred to.

Redirect examination.

By Mr. Hooker:

Q. Mr. Rodkey, how large is the city of Edmond?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial. Sustained. Exception.

129 Q. Well, is there much travel through and from the city of Edmond?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial. Sustained. Exception.

Q. Mr. Rodkey, after you got on the depot platform, what remark, if any, did you hear made, or inquiry, as to what particular place this was?

Mr. Asp. Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case or affecting it one way or the other.

Objection sustained at this time. Exception.

Q. Did any one make an inquiry of you Mr. Rodkey, after you had gotten off of the car, as to whether this was Edmond, or not?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, and not affecting any of the issues in this case.

Objection sustained.

Q. Do you know whether any of the passengers on that car got off at Edmond or not; do you know anybody that got off?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, and not in any — affecting the issues in this case or in any way contributing to the injury complained of.

Objection sustained.

Q. Where was Mrs. Calhoun when you first saw her after you got on to the depot platform?

A. I saw her on the platform, on the upper step.

Q. On the upper step of the car platform?

A. Yes, that is when I first noticed her.

Q. Where was the child at that time?

A. Well, they just handed the child off right then.

Q. Who did?

A. I don't know who handed it off; Mr. Robertson set the child down close by me.

Q. Did I understand you to say that Mrs. Calhoun had the child in her arms?

A. I did not see her with the child in her arms.

130 That is all. That is all.

Mr. HOOKER: I will read the deposition of Henry Dull (omitting caption):

Deposition of witnesses taken to be used in an action pending in the district court within and for the county of Oklahoma, in the Territory of Oklahoma, wherein Samuel Calhoun, by next friend, is plaintiff, and Atchison, Topeka & Sana Fe Railway Company is defendant, in pursuance of the notice hereto attached, and at the time and place herein stated.

The said plaintiff appeared by R. M. Campbell, his attorney, and the said defendant appeared by George M. Green, its attorney, and thereupon the said plaintiff produced the following witness, to wit:

HENRY DULL, of lawful age, being first duly sworn, deposes and says:

Direct examination by Mr. CAMPBELL:

Q. Please state your name?

A. Henry Dull.

Q. Where do you live Mr. Dull?

A. Hutchinson, Kansas now.

Q. What is your business at this time?

A. Working for Nelson Bros. Hardware Co.

Q. In what business have you been engaged in the last several months?

A. Teaching through the winter.

Q. State whether or not you were a passenger on the south bound Atchison, Topeka & Santa Fe train on August 24th last?
A. I was, the night of the 24th.
Q. Where did you board the train, Mr. Dull?
A. At Winfield.
Q. Where did you leave it?
A. At Edmond, Oklahoma, I left it.
Q. State whether you were traveling on a pass or a ticket?
A. On a ticket.
Q. You paid regular fare?
A. Yes sir.
Q. State whether or not, the conductor, after you boarded the train, took up your ticket?
A. Yes sir.
Q. Did he give you anything in return for it?
A. He gave me a slip.
131 Q. What did you do with that slip, when he first gave it to you?
A. Put it in my hat.
Q. What time did you arrive at Edmond that time Mr. Dull?
A. About midnight as near as I could tell; I had no watch.
Q. Did you know Mrs. Anna Calhoun, the lady whose child is alleged to have been hurt at Edmond.
A. I did then.
Q. Had you no previous acquaintance with her?
A. No sir, none whatever.
Q. Was she accompanied by any person?
A. In the train there was a lady sitting with her.
Q. Any child?
A. Yes sir, she was accompanied by her child.
Q. About what was the age of that child?
A. About two years, I should judge.
Q. A boy?
A. Yes sir.
Q. Were you in the same car with Mrs. Calhoun and her child?
A. Yes sir.
Q. When you arrived at Edmond state whether or not you knew that that was your destination?
A. I did not.
Q. Had the station been called in the car you were in?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case, and calling for the conclusion of the witness, and to the competency of the witness.
Overruled. Exception.

A. No sir.
Q. How did you learn, if you did learn, that you were in Edmond?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial.
(No ruling.)

A. In traveling I was out sight seeing, and I would step off on the platform and look around, and just as I stepped off a man that I had

previously talked with gave me a push and said "This is where we want to stop." He had asked me about the hotel, if I knew anything about it, and he said "This is the place we are to stop." I said, "This is not Edmond." He said, "Yes, it is." I said, "They have not called a station since we left Guthrie, and I thought there were two between here and Guthrie." I went over to the conductor and asked him if it was Edmond, and he told me it was, and I
132 had to go back in the train and get my grip.

Mr. Asp: We move that the answer be stricken out as not responsive to the question and as stating a conclusion of the witness, and as incompetent, irrelevant and immaterial and hearsay, and in no was affecting the right of the plaintiff in this case.

Overruled and excepted to.

Q. Did you go back in the train for your grip?

A. I got it.

Q. When you went back in the train for your grip did you see this lady Mrs. Calhoun, and her child.

A. I saw the lady come down the isle and come towards the end of the car that I was getting off.

Q. Did she come behind you or in front of you?

A. Behind me.

Q. You got off there?

A. Yes sir.

Q. Tell me what occurred there?

Q. When I stepped off the train I went over to the side of the depot and set my grip down——

Q. Tell what you did?

A. I looked off to get my direction, and the train was started and while it was going this lady came to the next to the last step and handed the child to a boy on the platform, I do not know who the boy was. This boy handed it then to another fellow they call the check man.

Q. Handed the child?

A. Yes sir, and he hollowed at the lady something that I did not hear, as the train was going too fast for her to step off safely and she stayed on and the man ran then to hand the child back to her, clear off the platform. This man ran into one of those long baggage trucks, and the child fell out of his hand and went under the wheel of the car on the right hand side of the track. The man had to leave the child loose I presume, to save himself from going under.

Q. Did the man fall with the child in his hands?

A. Yes sir, he ran into the truck.

Q. Did the man fall down?

133 A. He fell down, not clear flat, but almost, caught the truck as one would.

Q. And the child was dropped?

A. Yes sir.

Q. What occurred then?

A. Its foot got under the wheel and by some means the wheel drew it up and threw the child off just a little. That man had great

presence of mind, and caught the child and drew it out, keeping the other wheels from running over it.

Q. Was the child hurt?

A. It had its foot cut off just above the ankle.

Q. What was done there Mr. Dull, omitting what was said as nearly as you can, unless by some member of the train crew?

A. The child was picked up and taken back in the depot and the doctors sent for.

Q. Was the train stopped?

A. Yes sir.

Q. Did the mother return to the child?

A. The mother was on the train, and she came back and took up the child in her arms and carried it into the depot herself.

Q. How far did the train go before it stopped after the child was injured, as near as you can tell?

A. Possibly three lengths of one of those cars.

Q. Did the child make any outcry when it was injured?

A. Yes sir.

Q. What did you do further in connection with this matter and what else was done?

A. After we had done all we could by bandaging to stop the blood until the doctors came, I went out with a lantern and looked for this foot that had been cut off. Took it into the depot.

Q. Took it in there.

Mr. Asp: Objected to as incompetent, irrelevant and immaterial.

Overruled. Exception.

A. Yes sir, keeping it hid all the time from the mother——

The Court: Just a moment: that is not material,—the fact that he kept it from the mother——

134 The Court: He said he got the foot; I will exclude the rest of it. (Counsel leaves some part of deposition unread.)

Q. Mr. Dull what time of the day or night was it when you boarded that train at Winfield, if you remember?

Mr. Asp: I think that question is incompetent.

Objection sustained.

Q. Was the train on time or behind time when it reached Edmond?

A. Behind time a few minutes.

Q. Did the conductor or the porter or the brakeman, or any person call the Edmond station in the car you were in and in car Mrs. Calhoun was in?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case and the qualification of the witness is not shown, the answer being a conclusion of the witness.

Overruled. Exception.

A. No sir, not while I was in the car.

Q. You said the conductor gave you a slip for your hat?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial. Overruled. Exception.

A. Yes sir.

Q. What became of that slip?

Same objection, and not responsive to any issue in the case. Overruled. Defendant excepts.

A. After he told me on the platform that that was Edmond I handed it to him.

Mr. Asp: We move to strike out the answer of the witness as not responsive in any way to any issue in the case, or tending to prove or disprove any issue in the case.
Overruled. Exception.

Q. What was the first information that you had that that station was Edmond from the conductor or from any person in charge of that train?

Mr Asp: Same objection as last above.
Overruled. Exception.

135 A. After I had stepped off on the platform and asked him if that was Edmond.

Q. And you asked him that question after you heard it said it *said said it* was Edmond?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case, and hearsay and not tending to prove or dis*ap*prove any fact in the case.
Overruled. Exception.

A. Yes sir.

Q. Were there any lights on that platform station Mr. Dull?

Same objection by Mr. Asp as last above. Overruled. Exception.

A. There were two lights, one at either end; I should judge about 40 feet apart.

Q. Two lamps?

A. Yes sir.

Q. Were they burning that night?

A. If they were they were very dim.

Q. Were there any lights in the station anywhere?

A. One light in the station.

Q. Were there any lights in the office part of the station?

A. That is where I mean.

Q. Any light in the waiting room?

A. I did not go into the waiting room?

Q. What kind of a light was there in the bay window of the ticket room, bright or dim?

A. Bright enough for a man to work around in the room.

Q. Did the lights, such as they were, give a good light or a poor light on the platform?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial

and not responsive to any issue in the case and as calling for the conclusion of the witness.

Overruled. Exception.

A. I would consider it poor.

Q. Could you see people distinctly and tell what they were doing?

Same objection as above. Overruled. Exception.

A. I should not have known the conductor only by the buttons on his clothes.

136 Q. Did you see the truck before the young man ran into it?

A. No sir.

Q. How far was the truck standing from the train at the time the young man struck it?

A. The closest part was three feet I should judge.

Q. At what angle with regard to the train, parallel or at some angle with it, at the time he struck it?

A. I did not see it before he struck it.

Q. When you observed it how was it?

A. The railroad I think runs north and south. Should it run north and south it was standing at an angle of about thirty degrees.

Q. Thirty degrees northeast and southwest?

A. About forty degrees I should judge.

Q. What was it, northeast and southwest, or southeast and northwest?

A. Northeast and southwest.

Q. Was the young man who was running with the child running along the train, near the car, close beside it or at some distance from it?

A. About four feet from it.

Q. With reference to the wooden depot platform, was the truck on the wooden part or beyond it?

A. Beyond it.

Q. South of it?

A. Yes sir.

Q. Then your statement is that the accident occurred just south of the wooden platform?

A. Yes sir.

Q. Any steps there at the south end of that platform?

A. It goes down gradual.

Q. An incline?

A. Yes sir.

Q. Did you notice this lady before you reached Edmond, when you were on the car?

A. I did.

Q. Was she awake or asleep?

A. She was awake every time I saw her.

Q. Was she attentive or otherwise to what was going on, so far as you could observe?

137 Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case, and not

showing that this witness made any exact scrutiny of those things to ascertain what she was doing.

Overruled. Exception.

A. I saw her very attentive at one time. What called my attention to that part of the car was the fact that at some station north of Guthrie there was a crowd of people escorted a couple of others that got on the train and they were talking and joshing at the window, and I noticed everyone near the window was taking in a large proportion of the fun. They were all awake at that time——

Mr. Asp: We move to strike out the answer as incompetent, irrelevant and immaterial and not relating in any way to the facts of this case, or to any issue involved in this case.

The Court: I do not think it is material; the answer seems to have no bearing on the matter.

Q. What did you notice this lady doing at that time?

A. She was watching the jests and conversation——

Objected to. Sustained.

Q. How long did the train stop at Edmond, Mr. Dull, according to your judgment in the matter?

A. I would judge 30 minutes.

Q. Stopped thirty minutes?

A. Yes sir.

Q. That included the accident and all?

A. Yes sir.

Q. How long did it stop when it first stopped?

A. The first stop?

Q. Yes?

A. About three minutes.

Cross-examination.

By Mr. Green:

Q. Mr. Dull, what was on this truck at the time of the accident? Was there any trunk or baggage on the truck?

A. When the man ran into it?

Q. Yes.

A. Why no, there was nothing on the truck, but the baby
138 was laid up there.

Q. Now, Mr. Dull, this truck was not standing where the passengers boarded and alighted from this train, was it?

A. Not directly in front of the station, no.

Q. Then you alighted from the train right in front of the station?

A. I did, yes sir.

Q. Then was this lady attempting to alight from the same train from which you alighted?

A. Yes sir.

Q. Then she was right directly in front of the bay window?

A. Down a little bit south.

Q. There was a light in the bay window?

A. Yes sir.

Q. The train was lighted, lights in the cars?

A. Lights in the car I was in after I moved into this other car, the car just ahead had no lights in.

Q. You were in the same car the lady was in were you?

A. From about Arkansas City on down I was in the same car. I rode from Winfield to——

Q. Then you were in the same car which Mrs. Calhoun and child were in when you came into Edmond?

A. Yes sir.

Q. Do you know whether the conductor informed Mrs. Calhoun at Guthrie or between Guthrie and Edmond that the next stop would be Edmond?

A. If he did, he went to her individually and told her.

Q. How many stops did the train make between Guthrie and Edmond, or were there any?

A. I cannot recall.

Q. Did the train stop at one station between Guthrie and Edmond?

A. I say, I cannot recall whether it did or not.

Q. If the train had stopped between Guthrie and Edmond, you would have known it, would you not?

A. Yes sir.

Q. How is it then you cannot recall now?

A. Because I would have known if the train stopped, but my memory might not serve me now.

139 Q. In your judgment did the train stop between Guthrie and Edmond or was Edmond the first stop after Guthrie?

A. As I told you I cannot recall whether it was or not.

Q. Now the car that you were in and also which Mrs. Calhoun and the child were in was brightly lighted, was it not?

A. Yes, it had good lights.

Q. Those lights shone out on the platform quite a ways?

A. Well, they would light about half the platform.

Q. How wide was the platform at Edmond?

A. I would judge nine or ten feet.

Q. Then the light shown out at least four or five feet from the train?

A. Yes sir.

Q. Well, now when this boy took the child and ran with it along the side of the train, was he running in that light or was he outside of the light? That is, was he more than five feet from the train or closer than five feet?

A. Do you mean the boy?

Q. This boy that carried the child?

A. That was a man.

Q. Well, then, the man?

A. About four feet.

Q. He ran about four feet from the train?

A. Yes sir.

Q. How far did he run with the child until he struck this truck?

A. He ran the length from where the child was handed to him,

somewhere near the front of the bay window, to several feet off the wooden platform. As to that I cannot give an estimate of feet.

Q. How close was he to the platform when he was running with the child?

A. It looked as if he was trying to board the train or give the child to someone.

Q. And was he close enough to this platform to hand it to any one?

A. As to his intentions, I cannot state, but it appeared that he was trying to catch up with that end of the car where Mrs. Calhoun was standing to hand the child to her. That was my judgment of his intentions.

140 Q. Did he catch up with her at any time during the time he was running?

A. No sir.

Q. Then he was not at the steps of the car?

A. No sir, he did not catch it.

Q. Well, now, I wish you would describe this truck, just describe it?

A. Well, I could describe it so that you would understand it.

Q. Describe it?

A. It was a two wheeled truck. That is it had two large wheels, regular express truck for small express. Not one of these four wheeled trucks with a tongue to it. It had a wooden frame lined with iron, and one of this kind you can push and turn on the middle wheels, and had a balance to keep it from pushing over.

Q. How long was it?

A. Ordinary length of this kind of trucks.

Q. Can you not estimate it in feet?

A. I should think they are eight feet long.

Q. Then this was a truck about eight feet long with two large wheels on the middle?

A. Yes sir.

Q. And then two small wheels on each end?

A. I do not know whether they were wheels or not.

Q. How far from the ground is it probably to that truck; how high is the bed of the truck from the ground?

A. I would judge about two feet. A little more maybe.

Q. A little under two feet?

A. Yes, I should judge so.

Q. Did you hear any of the conversation or any of the exclamations that Mrs. Calhoun made while the train was starting to move out?

A. I heard the noise, but I could not hear what she said.

Q. Could you tell from the noise what she wanted?

A. Her actions and the noise she made indicated that she wanted the child put back on the train. I could not tell after it had passed out in front of that bay window. She would then be practically in the dark. Too dark to tell.

141 Q. Now these lights on the platform were burning, were they. I believe that you testified that they were?

A. Two lights, yes sir.
Q. One on each end?
A. Yes sir, light on each end.
Q. Were they on the depot or platform?
A. They were put up on the side of the depot.
Q. And they were burning?
A. They were burning but were not bright lights, these two were not.
Q. What kind of a night was it, dark or moonlight?
A. Cannot say; don't remember, whether it was moonlight or not.
Q. Now, Mr. Dull, when this man was running with the child was he watching where he was going or was he trying to board the steps with this child?
A. Well, that is a hard question to answer, but anyone would presume that he was watching both places. I should if I was in the same situation,—would have tried to.
Q. Well, there was sufficient light from this train, was there not, if one had been running along there, to see this truck?
A. There was in case a man was paying pretty close attention. If the man had have been walking he perhaps would have seen it but all the lights he had were the lights coming out of the car.
Q. The cars were brightly lighted were they?
A. The car I was in at Edmond was lighted, the other ahead was not.
Q. He was never ahead of that car?
A. He never was.
Q. He was running along beside that other car?
A. Yes sir, the car we rode down there in.
Q. That was the car directly back of the smoker?
A. Yes sir, they were smoking in the car ahead.
Q. Then you were in the second car in which there were passengers?
A. I do not know what was ahead of the one I was in first.
Q. Do you know whether there was a car back of that car or not, back of the car in which you came into Edmond?
142 A. I won't say for certain but my judgment is that there was another car back of that.
Q. Well, now, about how close from your observation was this man who was running with the child to the steps on which Mrs. Calhoun was standing while the train was moving out?
A. I should judge half the length of the car.
Q. Then he was about the middle of the car?
A. I should judge he was.
Q. And he was running about three feet from the train?
A. About four feet from the train.
Q. Well, now, there were steps back of the steps on which Mrs. Calhoun was standing, were there not?
A. On the other end of the car you mean?
Q. Yes?
A. Yes sir.
Q. How far was this truck from the steps where you alighted?

A. That is a question that would be impossible to answer under the circumstances. I have had such short notice that I could not even make a guess at it.

Q. Well, it was down below you several feet, a hundred feet or more?

A. I could not say how far it was.

Q. It was not anywhere close to where passengers came off the train, was it?

A. I will answer your question if you will tell me how long the platform is.

Q. I wish to get your judgment.

A. I don't want to give conflicting statements, and that is rather hard to answer.

Q. When you got off the train at Edmond, you say you saw the conductor at the steps when you got off?

A. He was on the platform.

Q. How far from the steps when you got off?

A. I judge about eight feet.

Q. Did he have a lantern in his hand?

A. Yes sir.

143 Q. Did you see the porter there?

A. I did not see the porter.

Q. The brakeman?

A. No sir, they were handling luggage.

Q. How soon did you get off the train, after it stopped at Edmond?

A. About a minute, the first time *of* got off.

Q. Did you see this child fall under the train?

A. Yes sir.

Q. How was the man carrying the child?

A. He had hold of it about like this (indic.) out away from him, just like he was running to hand it to some one.

Q. Holding it in both hands and out from his body?

A. Yes sir, not very far out from his body.

Q. He was holding it in both hands directly in front of him?

A. Yes sir.

Q. And running along?

A. Yes sir.

Q. He was running fast was he?

A. He was going about as fast as he could conveniently go.

Q. Well now, Mr. Dull, could it not have been possible for this station to have been called without your hearing it, by the porter or conductor?

A. Not if it was called the way they should call stations.

Q. Well, but you say you were not in this car all the time?

A. I was in this car all the way from Arkansas City down to Edmond. Before I was in the smoking car ahead, and it was not lighted up at all, and I changed and came back into this car where there was a light.

Q. You don't know whether the conductor informed Mrs. Calhoun that Edmond would be the next station, do you?

A. As I said before, not unless he did it personally; went to her and told her personally.

Q. Did you see the conductor have any conversation with Mrs. — at Guthrie, or between Guthrie and Edmond?

A. I did not.

Q. Well now, you say when you were going into Edmond or between Guthrie and Edmond, you were having a discussion with some fellow?

144 A. I was talking with a man. He asked me where I was going to go, and I told him Edmond, and he asked me about the hotels. Had it not been for his telling me when I stepped off, I presume they would have carried me by.

Q. Did you hear any of the conversation that was had between the boy, as you say, and the man who carried the child? I believe you testified that the child was handed to the boy?

A. Yes sir.

Q. And this boy handed it to this man who ran with it?

A. Yes sir.

Q. Did you hear any of the conversation between this boy and this man?

A. The child was handed to the boy, the man came up and grabbed the child and I did not hear any of the conversation. He just took the child and started to run with it. If there was any conversation I did not hear it.

Q. How long did you say the train stopped at Edmond, the first stop?

A. About three minutes I judge.

Redirect examination by Mr. CAMPBELL:

Q. Mr. Dull, do you remember who handed the child down to the boy, whether the boy or someone else?

A. I do not remember who it was.

Q. I believe you said that Edmond was your destination that night?

A. Yes sir.

Q. Did the conductor or any one else inform you before you reached Edmond that that was the next stop?

A. No sir.

Q. And you had a ticket calling for that station?

A. Yes sir.

Q. Was Mrs. Calhoun attempting to get off the front or south end of the car or the back?

A. The front end, the south end.

Q. So it was the car in which she had been riding that injured the child.

A. Yes sir.

145 Q. You stated that the car was well lighted?

A. Yes sir.

Q. I will ask you whether the porter had come through and turned the lights down before you reached Edmond?

A. No, he had not.

Q. Mr. Dull, when was your attention first directed to those lamps there in the station on the outside, did you notice them that night or was your attention first called to them the next day? Those outside lights,—did you notice them that night, or was your attention called to them the next morning?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial. Objection sustained. Plaintiff excepts.

Q. (Leaving out some of deposition.) Would you be able to state as an independent fact that those lamps were burning that night?

A. Yes, unless that light was coming from the train windows. There was light coming from there.

Q. And when you saw these lamps you reached the conclusion that the light came from these lamps?

A. Yes sir.

Q. Do you recall as an independent fact, independent of all facts and these conclusions that you have just drawn, that those lamps were burning?

A. Well, I really could not say that I noticed each lamp individually.

Q. Then do I understand you to say that independent of other facts from which you have drawn certain conclusions in talking about this matter, you do not remember about those lights?

A. No sir.

Recross-examination.

By Mr. Green:

Q. You testified, did you not that those lights were burning on that night?

A. I did, yes, as I said before, from conclusions. As I told you before, under such circumstances one would not notice each lamp individually.

146 Q. But you testified here in direct and also in cross examination, did you not, that these lights were burning on that night when the train came into Edmond?

A. I believe I did.

HENRY DULL.

The notice attached to the foregoing deposition is as follows:

Territory of Oklahoma, *Oklahoma County, ss:*

In the District Court of the Third Judicial District Within and for Said Territory and County.

Samuel Calhoun, etc., Plaintiff,

vs.

Atchison, Topeka & Santa Fe Railway Company, Defendant.

Notice to Take Depositions.

The said Atchison, Topeka & Santa Fe Railway Company, defendant and H. E. Asp and W. F. Wilson, its attorneys of record, will

take notice that on Monday the 18th day of April, 1904, the said plaintiff above named will take the deposition of sundry witnesses to be used as evidence in the trial of the above cause, in the office of Vandeever & Martin, in the City of Hutchinson, in the County of Reno in the state of Kansas, between the hours of eight o'clock A. M. and six o'clock P. M. of said day, and that the taking of the same will be adjourned and continued from day to day at the same place and between the same hours until they are completed.

R. M. CAMPBELL,
H. H. HOWARD,
Attorneys for Plaintiff.

Service of the above notice is hereby acknowledged to have been made on this 12th day of April, 1904.

W. F. WILSON,
Attorney for Defendant.

147 I, M. J. Date, notary public within and for the county of Reno, in the state of Kansas, do hereby certify that the above named Henry Dull, the witness whose name is subscribed to the foregoing deposition, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth, in the case aforesaid, and that the deposition by him subscribed was *by* him reduced in writing by me, M. J. Date, and subscribed by the witness in my presence, and the same was taken on the 18th day of April, A. D. 1904, between the hours of eight o'clock A. M. and 6 o'clock P. M. of said day, at the office of Vandeever & Martin, in the city of Hutchinson in the county of Reno, and state of Kansas, as specified in the notice attached hereto, and that I am not attorney for either of said parties or otherwise interested in the event of said action.

[SEAL.] J. M. DADE,
Notary Public.

My commission expires February 25, 1904.

Endorsed: 4054. Depositions. Published and filed in District Court, Oklahoma County, O. T. May 2, 1904. B. D. Shear, clerk, by Will H. Clark, Deputy.

148 Whereupon, the plaintiff introduces and reads in evidence the deposition of CLARENCE WALKER, as follows:

Read by Sam Hooker:

The deposition of CLARENCE WALKER, taken at the same time and place, and for the same purpose as stated in the caption.

Witness being sworn deposes as follows:

Q. State your name, age, residence and occupation?

A. I am 27 years of age, live in Edmond and am in the hardware business.

Q. How long have you been living in Edmond?

A. About five years.

Q. Were you at the depot in Edmond the night of the accident to Samuel Calhoun, the plaintiff in this case?
A. I was.
Q. Were you there at the time the train came in?
A. Yes sir.
Q. How long had you been there before the train came?
A. Well, about five or ten minutes, I believe.
Q. Do you know whether the train was on time or not that night?
A. The train was late.
Q. What was the condition of the platform and the surroundings as to being light or not at the time you got there?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial the qualifications of the witness not having been established, not responsive to any issue in the case, and for the further reason that the question relates to a time other than the time of the accident.

Objection overruled. Defendant excepts.

A. Well, I don't believe there was any light except in the window of the office.
Q. Do you remember whether there were any lights other than the window of the office at the time the train came in?
A. I don't think there were, if I remember right there were not.
Q. Did you see the accident, Mr. Walker?
A. No sir, I did not.
149 Q. Where were you at the time of the accident?
A. I was on the car.
Q. How long did the train stop at Edmond that night?
A. Well, it wasn't over two minutes, I should judge.
Q. How long had you been in the car before the accident happened?
A. Well, I went to the back of the car that I got on and took the third seat I believe, from the back and had just gotten seated and raised the window when the accident happened.
Q. Did you get on the train as soon as it came in?
A. Yes sir, I did.
Q. Did you do anything else from the time the train came in except get on and go to that seat and sit down and raise the window?
A. I did not.
Q. Was the train moving or not at the time you raised the window?
A. It was moving.
Q. What first attracted your attention to this accident?
A. I heard the child scream just under the window I was sitting by.
Q. How far now, was it from the place of this accident to the south end of the depot?
A. Well, I should judge about sixty feet.
Q. How far from the water tank?
A. About thirty feet, I expect.
Q. Which way?
A. North.

Q. What did you do when your attention was attracted to this accident?

A. I turned to the gentlemen back of me and made the remark that I believed the child was run over, and then I jumped out of the window.

Q. Where were you when you jumped out of the window?

A. I was 30 or 40 feet south of the water tank.

Q. Did you see this lady when she came out of the car to get off the car platform?

150 A. She was standing on the platform or just getting out at the door when I went off of the platform into the other car.

Q. Did you see the child when it was helped off the car platform or steps?

A. Well, I don't remember noticing it

Q. Do you know which way the lady went after you saw her when you entered the car?

A. Which way she went?

Q. Yes, that is, whether she went back into the car?

A. No, the last I saw of her, she was standing on the platform when the train began to move.

Q. Where was the child when you saw it?

A. Mr. Rodkey was holding it in his arms and he was leaning against the truck.

Q. Did the accident occur along about where the truck was situated?

A. Yes sir.

Q. Now, with reference, Mr. Walker, to the tank and the depot, where was that truck?

A. Well, it was on the south end of that platform and it must have been about 30 feet from the tank, probably a little more and twice that distance from the depot, and when I saw it it was angling across the platform.

Q. Now, if I understand you, it was 30 feet north of the tank?

A. About that I should judge, and sixty feet south of the depot.

Q. Was there a wooden platform there at that time?

A. Well, there were heavy timbers there about 18 inches wide, two of them I should judge, and back of that there is gravel.

Q. How much higher is the timber than the gravel?

A. Well, I could not say that there is any difference, I never noticed them.

Q. There is a step or incline from the timber to the gravel?

A. I don't think so.

151 Q. When you saw the truck how far from the train was it?

A. Well, had the train been standing there one end of it could not have been more than three or four feet away.

Q. Do you know whether that truck was on the board platform or the gravel platform?

A. Well, the wheels were on the gravel part of the platform, while one end of the truck extended over the wooden platform.

Q. Which way were the handles of the truck?

A. Well, there was an handle to the truck on each end of it.

Q. Which way was the truck sitting?
A. It was sitting at an angle of about northeast and southwest.
Q. Was there anything on the truck at the time you saw it after the accident?
A. I didn't notice anything.
Q. What was the condition of the injury, Mr. Walker?
A. Well, when I saw the foot first it was almost off just below the ankle angling across the foot, and the child made a movement with its other foot and severed the connection that was holding it and it dropped to the ground.
Q. You don't know what became of the foot?
A. Someone took it up in a handkerchief.
Q. Now, at the time this lady was on the platform, as you have detailed, was there any employés of the company assisting her to alight or not?
A. There was not, if there was I didn't see it.
Q. Do you know where the porter, conductor and brakeman was.
A. I couldn't say?
Q. Do you know whether any of them were near the steps of the platform from which this lady was attempting to alight?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in this case.
Objection overruled. Defendant excepts.

152 A. I didn't see them if they were.
Q. Now, you have been around that depot a good deal, have you not, when the train was coming in and going out?
A. A good deal.
Q. I will ask you to state whether in starting out that night the train moved faster than usual?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness and not responsive to any issue in the case.
Overruled. Defendant excepts.

A. Well, I couldn't say as to that; it was moving pretty fast when I jumped off.
Q. In your judgment how long did the train remain at the depot that night?
A. Well, it wasn't over two minutes I believe I am safe in saying.
Q. Do you know anything else Mr. Walker about this matter, that I have not asked you about?
A. I believe not.

Cross-examination:

Q. Mr. Walker, you reside in Oklahoma County?
A. Yes sir.
Q. You are not contemplating moving away are you?
A. I don't know that I am.
Q. Or taking an extended trip?
A. No.

Q. You are in good health?
A. Yes sir.
Q. You would attend court is you were subpœnaed as a witness?
A. Yes sir.
Q. The train was lighted that night, was it?
A. Yes sir.
Q. Which car did you get on?
A. I think it was the chair car, but I am not positive.
Q. You don't know which car it was from the engine do you?
A. No.
Q. The last car in the train?
A. Well, I must have taken the car next to the smoker.
Q. Then you were in the car back of the smoker?
A. Yes sir, I think I was. I couldn't say positively; I
153 don't remember.
Q. Now, how far were you from the end of the car,—that is, where you took your seat in the car?
A. Not more than the third seat from the back.
Q. Which step did you get on that car, on which end of that car?
A. The back end.
Q. The back end?
A. Yes sir.
Q. Now, is this the same step that the lady got off that you got on?
A. She was on the end of the other car just back of us on the south end and she was trying to get off that step.
Q. Then she got off of the second car back of the smoker?
A. Yes sir. She was standing on the platform when I last saw her.
Q. Did you hear any conversation that she had with anyone while she was on the steps of the platform?
A. I don't remember hearing any; I do remember hearing her say something, but what it was I don't know.
Q. To whom did she address her remarks?
A. The lady that was with her.
Q. The lady that was with her—did she get off?
A. After the accident she did.

(Signed) CLARENCE WALKER.

Whereupon, the deposition of D. A. Talbot, is offered in evidence, by the plaintiff, and is read by Mr. Hooker, as follows, having first been admitted by the court:

TERRITORY OF OKLAHOMA, *Oklahoma County, ss:*

In the District Court of said Territory, within and for said County, in the Third Judicial District.

154 SAMUEL CALHOUN, by His Next Friend, Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendant.

Stipulation.

It is agreed and stipulated between the parties to this action, that the deposition of D. A. Talbot, to be taken this 23rd day of Novem-

ber, 1904, in the above styled cause, may be treated and used as deposition of said witness in the case of Emma Calhoun *vs.* Atchison, Topeka & Santa Fe Railway Company. It is further agreed and stipulated between the parties that said deposition may be taken in shorthand by Miss Maude Scott, and afterwards transcribed and signed by the witness in the presence of the notary before whom this deposition is to be taken.

R. M. CAMPBELL,
Attorney for Plaintiff.
GEO. M. GREEN,
Attorney for Defendant.

155 Deposition of witnesses taken to be used in an action pending in the district court within and for the county of Oklahoma, Territory of Oklahoma, wherein Samuel Calhoun, by his next friend, is plaintiff, and Atchison, Topeka & Santa Fe Railway Company is defendant, in pursuance to the notice hereto attached, and at the time and place therein stated.

Said Samuel Calhoun, plaintiff appeared by his attorney, R. M. Campbell, and said Atchison, Topeka & Santa Fe Railway Company, defendant, appeared by its attorney, George Green, and thereupon the said plaintiff produced the following witness to wit:

D. A. TALBOT, of lawful age, who, being duly sworn, deposes and says:

Q. State your name, residence and occupation?

A. D. A. Talbot, Oklahoma City is my residence, occupation, traveling salesman.

Q. State whether or not you were on the south bound Santa Fe train in August, 1903, when said train passed Edmond on the occasion when the little boy, Samuel Calhoun, was injured by said train?

A. I was.

Q. State whether or not you were in the same car in which Mrs. Anna Calhoun and her little boy were riding?

A. Yes sir.

Q. Where did you board that train that night?

A. At the little town at the junction of the Guthrie and Kingfisher road this side of Guthrie.

Q. Seward?

A. Seward is that the name of the town? Well, there is where I got on the train.

Q. Did you have occasion to notice Mrs. Calhoun's actions as they approached Edmond; did you notice them?

A. I did.

Q. Was she awake or asleep?

A. She was awake.

Q. Did the porter or brakeman, or any of the train crew call the station of Edmond as you approached it, in the car that you
156 were riding in?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case.

Overruled. Defendant excepts.

A. They did not.

Q. That was the same car occupied by Mrs. Calhoun?

A. Yes sir.

Q. Did you notice her when she left the car after reaching Edmond?

A. Yes sir.

Q. Did she leave the car immediately after the train stopped?

A. No sir.

Q. About how long after the train stopped at Edmond before she left the car?

A. Well, now, I don't know how long, but the train stopped, and the rustle that is usual on such occasions, people getting off the train—those that knew what the town was had gotten off——

Q. Before she left?

A. Yes sir.

Q. State if you know the manner in which her attention was called to the fact that the town had been reached?

A. I do.

Q. State them?

A. She says, "What town is this?" About three of us, I don't know who they were, but I was one of them,—I says, "Edmond." She says, "This is where I must get off," and she started off.

Q. She immediately began to leave the car with the boy?

A. Yes sir.

Q. How were you sitting in the car with reference to Mrs. Calhoun?

A. I was on the east side of the car, riding with my face to the north; the train was coming south. Mrs. Calhoun was on the west side of the car, and probably two seats in front and to the west of me, just across the aisle. She was riding with her face to the south.

Q. Do you remember how that train was lighted?

A. No, I don't, but the train was lighted all right.

157 Q. You don't remember whether the lights had been turned out?

A. No, I don't really think they were. The train was lighted.

Cross-examination:

Q. How many times did the train stop between Seward and Edmond?

A. To the best of my recollection it didn't stop nary time.

Q. Where was your destination?

A. Oklahoma City.

Q. Do you travel in Oklahoma extensively?

A. Part of Oklahoma, part Indian Territory, all the time.

Q. You are familiar with the stations on the several lines in Oklahoma, are you not?

A. Yes, most of them, that is the territory that I cover.

Q. Then when you are traveling, you do not expect to be in-

formed by the conductor or porter of the train the names of the station, do you,—that is, you are familiarly acquainted with the names of the stations, and don't pay any particular attention to the stations being called?

A. Yes sir, I do.

Q. Why do you make that a practice, if you do?

A. Well sir, it is very important to us that we get off at the stations where our baggage is unloaded. If we are carried through or ride past we probably lose a day.

Q. Well, aren't you acquainted with the towns, so that you don't have to be informed?

A. Well, yes, but at the same time, I depend largely on the porter calling the town.

Q. Did a porter come through the train on this night, prior to the stopping of the train at Edmond?

A. Yes sir.

Q. Which end of the train did he come in,—or of the car, rather?

A. Came in at the south end.

Q. Came in to your back then?

A. Yes sir.

158 Q. Could it have been possible for the porter to have announced the name, and you not seeing him not to have heard the station called?

A. You mean to say, could he have called that station and me not heard him?

Q. Yes. That is, you not being informed he was coming through, not expecting him, and he could have called and you not have heard it?

A. It might have been possible that he called it in a whisper, but he never called it in that tone of voice that a station is ordinarily called.

Q. Did the conductor come through the car from the time you got on the train at Seward until it stopped at Edmond?

A. Yes sir.

Q. Do you know whether or not he had any conversation with Mrs. Calhoun?

A. No, I don't know.

Q. About how long did the train remain standing at Edmond when it first stopped?

A. Probably a minute and a half or two minutes.

Q. Were all the lights burning in the train?

A. Couldn't say.

Q. Were all the lights burning in that car?

A. That I don't know.

Q. There were some lights burning?

A. Yes sir.

Q. Was the train moving or standing when Mrs. Calhoun was getting off, or attempting to get off?

A. It was moving.

Q. Where was Mrs. Calhoun when the train first started to move?

A. She was approaching the door.

Q. She had not gotten out on the platform, then, when the train started to move?

A. No sir.

Q. Did you leave the car at Edmond that evening when the train first stopped there?

A. No sir.

Q. You didn't see the accident?

A. No sir.

159 Q. Do you know whether the station lights were burning or not at Edmond?

A. At the time the accident happened, I don't know.

Q. You were on the east side of the car and Mrs. Calhoun was on the west side. Then when the train got into Edmond, Mrs. Calhoun would be on the side upon which the station is located, would she not?

A. Yes sir.

Q. How many passengers got off at Edmond from this car in which you were riding?

A. I don't know.

Q. Were there any?

A. I think there were, there was a commotion,—some probably got off and got on again, I don't know, but there was a commotion in the car.

Q. Why was your attention called to Mrs. Calhoun that evening?

A. When I came in and took my place in the car, almost the first thing that caught my eyes was Mrs. Calhoun, and I thought I recognized the woman, thought I knew her, and all the way down I was trying to make out who she was.

Q. Are you acquainted with Mr. Calhoun?

A. Not as much as I was with Mr. Calhoun, yet I knew her.

Q. Any relation to Mrs. Calhoun?

A. No sir.

Q. How fast was the train moving when Mrs. Calhoun got to the door of the car?

A. Oh, very slow,—just starting up.

Q. How much baggage did she have?

A. I don't remember noticing any baggage; still I believe she had a little grip, too.

Q. Did she have more than one grip?

A. I wouldn't testify that she had any baggage.

Q. If she had had an abundance of baggage, no doubt your attention would have been called to that fact, would it not?

A. Why, I think I would have noticed if she had had lots of baggage, still I don't remember.

160 Q. Did some other woman go with Mrs. Calhoun to the door of the car?

A. Yes sir.

Q. Did you hear any exclamations made by Mrs. Calhoun or any one else after Mrs. Calhoun had gotten out onto the platform of the car?

A. Yes sir.

Q. What were they?
A. Why, all that I heard was just, "Oh!" something like that, then there was such a confusion of talk I didn't hear anything else.
Q. Did you hear Mrs. Calhoun's voice out there?
A. I wouldn't recognize her voice from anyone else's voice.
Q. Did you know who made the exclamation, "Oh!"?
A. No sir.
Q. Did you see the child when it was attempting to be put back on the car?
A. No sir.
Q. Then your recollection is that the train was moving at the time Mrs. Calhoun was leaving the train?
A. Yes sir, the train was standing still when she started from where she sat to door, but the train started to move before she reached the door.

Redirect examination:

Q. Mrs. Talbott, state whether or not you afterwards learned that Mrs. Calhoun was an acquaintance of yours, and when it was, if you so learned?

Objected to (in the depo.) as incompetent, irrelevant and immaterial, and not a proper issue in this case. (Obj. not insisted on.)

A. Yes sir.
Q. State when you learned that fact.
A. Well, I can't state just when.
Q. After the accident or——
A. Oh, yes, after the accident.
Q. Then you learned that you had known her formerly?
A. Yes sir.

(Signed) D. A. TALBOTT.

161 I, W. H. Zwick, notary public within and for the county of Oklahoma, Territory of Oklahoma, do hereby certify that the above named D. A. Talbott, the witness whose name is subscribed to the foregoing deposition, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the case aforesaid, and that the deposition by *him* subscribed was reduced to writing by Miss Maude Scott, and subscribed by said witness in my presence, and that the same was taken on the 23rd day of November, 1904, between the hours of eight o'clock A. M. and six o'clock P. M. of said day, at the office of H. H. Howard, in the Baltimore building, in the city of Oklahoma *City* in the County of Oklahoma, and territory of Oklahoma, as specified in the notice hereto attached; that I am not attorney for either of said parties, or otherwise interested in the event of said action.

[SEAL.] WILLIAM H. ZWICK,
Notary Public.

My commission expires November 11, 1906.

4054. Published at request of Sam Hooker, att'y.
Files in district court, Oklahoma County, O. T. Nov. 23, 1904.
B. D. SHEAR, *Clerk.*
WILL H. CLARK, *Deputy.*

162 Whereupon Mr. RODKEY is recalled and testifies as follows under oath, on behalf of the plaintiff:

By Mr. HOOKER:

Q. Mr. Rodkey, at the time that you got off of the car platform down on to the depot platform, did you see the conductor, the brakeman, the porter or any of the railway employés around there?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, and a repetition.

Overruled. Defendant excepts.

A. I didn't notice any.

Q. Now when Mrs. Calhoun came out on to the car platform, and the boy was handed down by this party, Mr. Robertson, did you see the conductor or any of the employés around there?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial and a repetition, and not responsive to any issue in this case.

Overruled. Exception.

A. I didn't notice any.

Mr. ASP: When you saw her appear on the platform and hand the child off to somebody, it was about four minutes,—I understood you to say from the time that you got off the train?

A. Yes, about three of four minutes.

Q. That is the best of your judgment?

A. That is the best of my judgment.

ROY MAYALL is the next witness called to the witness stand by the plaintiff and gives the following testimony under oath:

By Mr. HOOKER:

Q. Mr. Mayall, were you in Edmond the night that Samuel Calhoun received this injury?

A. Yes sir.

Q. Were you at the depot that night?

A. Yes sir.

Q. How long were you there before the train came?

A. About four or five minutes.

Q. What was the condition of the platform before the train came and at the time it came with reference to being light or dark?

163 Mr. ASP: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case, and not directed to the time of the injury.

Overruled. Defendant excepts.

A. It was dark.

Q. Do you know whether the lights that were attached to the north and to the south end- of the depot were burning?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case.

Overruled. Defendant excepts.

A. No sir, I think not.
Q. How long did the train stay at Edmond at this first stop?
A. About three minutes, I should judge.

Cross-examination.

By Mr. Asp:

Q. You came down with some persons, did you not?
A. Yes sir.
Q. Who did you come with?
A. Came down with Mr. Hines and Mrs. Grigsby and Miss Hunt.
Q. Did you have a wagon or a conveyance of some kind?
A. No sir, I did not.
Q. Were you with them while they were there at the station?
A. Yes sir.
Q. Where were you during the time they were waiting for the train—whereabouts on the platform—at the station?
A. We were on the platform just north of the bay window on the depot.
Q. Was there a light in the bay window?
A. I think so, yes sir.
Q. There was a light in the bay window?
A. Yes sir.
Q. That bay window has glass on three sides of it, so that the light standing on the table in the bay window would shine out on the platform, would it not?
A. Yes, it had lights on three sides.
Q. Did you go to the south end of the depot?
A. No sir.
164 Q. Then you don't know whether the light at the south end of the depot was burning or not.
A. I think not, I didn't see it.
Q. You didn't see it.
A. No sir.
Q. You didn't go there to see it?
A. No sir.
Q. Did you notice the train as it came in?
A. Yes sir.
Q. Were there lights in the cars?
A. I could not say whether there was lights in the cars or not.
Q. You didn't notice any lights in the cars?
A. No sir.
Q. You would not say whether there was or was not?
A. No, I don't remember.
Q. You did not observe that when the cars came in, that the light at the depot, and the lights from the cars, lighted the platform?

A. I did not notice that, at the time the train came in.
Q. What were you doing; was you talking to those young ladies?
A. Yes sir.
Q. You and they stood there a short time at that place after the train came in, did you?
A. Yes.
Q. And you did not see Mrs. Calhoun trying to get off?
A. No sir.
Q. You did not see the plaintiff taken off of the train and set on the platform?
A. No sir.
Q. You did not see Mrs. Calhoun at all before the accident?
A. No sir.
Q. You did not see the accident occur?
A. No sir.
Q. You didn't see Mr. Robertson take the child and set him on the platform?
A. No sir.
Q. You didn't see young Mr. Robertson take the child and give him to Carl Jones.
A. No sir.
Q. You didn't see Carl Jones running beside the train, trying to put the child back on the train?
A. No sir.
Q. And you did not notice whether there was any lights in the cars or not?
A. No sir.

Mr. Asp: That is all.

165 Loutella Hunt (Miss) is the next witness called to the stand by the plaintiff and gives the following testimony under oath:

By Mr. Hooker:

Q. Were you at the depot on the night that Samuel Calhoun received this injury?
A. I was.
Q. What was the condition of the platform with reference to being dark or light, prior to the time the train came in and at the time?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case and calling for a conclusion of the witness, and the witness not having been properly qualified to answer the question.
Overruled. Exception.

A. It was dark.
Q. Did you notice whether or not the lamps attached to the sides of the depot, north and south of the bay window, were lighted and burning?
A. They were not.
Q. You did not see this accident?
A. No sir.

Q. How long were you at the depot before the train came in?
A. About five minutes, I should judge.
Q. You were with some other young ladies and gentlemen there?
A. Yes sir.
Q. Were you engaged in conversation?
A. Yes sir.
Q. And you were all the time north of the bay window?
A. Yes sir.
Q. You didn't go to the south end of the depot, did you?
A. I didn't——
Q. Did you look to see whether the light at the south end of the depot was burning?
A. I didn't notice.
Q. You didn't go there to look did you?
A. No sir.
Q. Then you could not see whether or not that lamp was burning?
A. No.
Q. There was a lamp in the bay window, wasn't there?
A. Yes sir, I think so.
166 Q. And all three sides of the bay window,—were windows,—glass, weren't they,—so that the light would shine out?
A. Yes sir.
Q. Did you pay any attention to the train as it pulled in?
A. I did not.
Q. Did you notice whether or not there were any lights in the coaches, as it pulled in?
A. There were lights.
Q. There were lights in the coaches?
A. Yes sir.
Q. Do you remember,—well, you didn't see the accident?
A. No sir.
Q. You didn't see Mrs. Calhoun hand her baby off the train?
A. No sir.
Q. Do you know Mr. W. W. Robertson?
A. Yes sir.
Q. You didn't see him take the baby and put it on the platform?
A. I did not.
Q. Do you know his son, Walter M. Robertson?
A. Yes sir.
Q. You didn't see him take the baby?
A. No sir.
Q. You didn't see him give it to Carl Jones?
A. No sir.
Q. You didn't see Carl Jones running along the side of the train and trying to put the baby back on the train?
A. No.
Q. You didn't see the truck?
A. I think not.
Q. You didn't see the accident?
A. No sir.

Q. You didn't notice whether the lights in the cars windows shone out on the platform?

A. I didn't notice that.

Q. You just noticed that when you got there, the lamp on the north end of the depot was not burning and that it was dark, that is all you noticed, isn't it?

A. Yes sir.

Mr. HOOKER: I will now read the deposition of Mr. M. Yowell.

Which said deposition now read by Mr. Hooker, is in words and figures as follows (omitting caption):

167 *Stipulation.*

It is hereby agreed that the depositions of M. Yowell and J. S. Dow may be taken before Bertha Schupp, a notary public in and for Logan County, Oklahoma Territory, to be read as evidence on behalf of the plaintiff in the two cases above entitled, the said defendant waiving notice of the time and place of taking said depositions and attorneys for the plaintiffs waiving the fact that the notary taking these depositions is the notary in the office of the attorney for the defendant, and each party waiving the requirements of the witnesses personally signing these depositions.

R. M. CAMPBELL,
Attorney for Plaintiff.
HENRY E. ASP,
Attorney for Defendant.

Depositions of witnesses taken to be used in an action pending in the district court of Oklahoma County, in the Territory of Oklahoma, wherein Samuel Calhoun, a minor, by Anna Calhoun, his next friend, is plaintiff, and the Atchison, Topeka and Santa Fe Railway Company is defendant, and also to be used in evidence in the case pending in said district court of said Oklahoma County, wherein Anna Calhoun is plaintiff, and the said Atchison, Topeka and Santa Fe Railway Company is defendant, the said depositions being taken in pursuance of agreement hereto attached.

The said plaintiff, Samuel Calhoun, by Anna Calhoun, his next friend, and the said Anna Calhoun appearing by R. M. Campbell, their attorneys, in said action respectively, and the defendant appearing by Henry E. Asp, its attorney; and thereupon the said plaintiffs produce the following witnesses in the following order, to wit:

M. YOWELL of lawful age, being first duly examined, cautioned and solemnly sworn to testify to the truth, the whole truth and nothing but the truth relating to said two cases, deposes and says:

168 Examined by R. M. CAMPBELL on behalf of the plaintiffs:

1 Question. State your name?

A. Answer. M. Yowell.

2 Q. Where do you live, Mr. Yowell?
2 A. I live up in Kingfisher County, Downs township.
3 Q. State whether or not you were on the south bound Santa Fe train in August last year, when accident occurred at Edmond wherein the little boy was injured?
3 A. I was.
4 Q. Where did you board the train that night Mr. Yowell?
4 A. At Guthrie.
5 Q. Where was your destination?
5 A. Oklahoma City.
6 Q. State whether or not you saw Mrs. Calhoun and the little boy before they left the car at Edmond?
6 A. Yes sir, I saw them before they left the car.
7 Q. As they were leaving the car?
7 A. Yes sir, as they were leaving the car.
8 Q. Were you on the same car with those people?
8 A. Yes sir.
9 Q. About what time of night was it Mr. Yowell?
9 A. I guess it was long about midnight, I would not be positive what time of night it was.
10 Q. About how long in your opinion did the train stop at Edmond that night?
10 A. I should think they were there about five minutes.
11 Q. State all the facts and circumstances, as you remember them, attending the action of this lady and the little boy in leaving the car?
11 A. They come down the car and enquired if it was Edmond and we told her that it was and she went on out of the coach, and about the time she got to the door the train started.
12 Q. Did she leave the coach immediately when it stopped or just before it was leaving?
169 12 A. Just before it was leaving, about the time she got to the door it started?
13 Q. State whether or not the train porter or any of the members of the train crew called the Edmond station as you approached that station.

Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case, and the witness has not been properly qualified to answer the question. Overruled.

Mr. CAMPBELL: I will just withdraw that question.

14 Q. Did you see the train porter or any member of the train crew go through the car just before you got to Edmond?

Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case and not affecting in any way plaintiff's right to recover in either of these cases. Overruled. Defendant excepts.

14 A. I did not notice any.
15 Q. Did the porter or any member of the train crew call the Edmond station as you approached that point that night?

Objected to as incompetent, irrelevant and immaterial, not re-

sponsive to any issue in the case, the question as to whether or not the station was called having no bearing upon the result of the case, calling for a conclusion of the witness, and for the further reason that the witness has not been legally qualified to answer the question. Objection overruled. Defendant excepts.

15 A. I never heard him. If he called the station I never heard him.

16 Q. Are you familiar with the ordinary manner in which train stations are called on the Santa Fe Railroad?

Objected to as immaterial, not in any way responsive to any issue in the case and calling for a conclusion of the witness. Ob-
170 jection overruled. Defendant excepts.

16 A. Yes, sir, I am familiar.

17 Q. If the porter or other officer or employé of the company had called the station in that car in the ordinary manner in which that duty is attended to, would you have heard him?

Defendant objects to the form of the question, as incompetent irrelevant and immaterial, and calling for a conclusion of the witness, and not responsive in any way to any issue in the case. Objection sustained. Plaintiff excepts.

Q. 18. In what part of the car were you riding Mr. Yowell?
A. 18. In the front part of the coach.
Q. 19. South end?
A. 19. Yes sir, on the east side.
Q. 20. Did you leave the car after the accident to this little boy at Edmond?
A. 20. Yes sir.
Q. 21. What did you observe when you got out there?

Objected to as incompetent, irrelevant and immaterial, not in any way responsive to any issue in the case, no part of the *res gestæ*. Overruled. Defendant excepts.

A. 21. I was there with the crowd out there.
Q. 22. Did you see the boy?
A. 22. No sir.
Q. 23. State the condition of that platform, as to being lighted or dark?

Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case, in no way contributing to the injury, if injury occurred, and calling for a conclusion of the witness, and the witness has not been legally qualified to answer the question. Objection overruled. Defendant excepts.

A. 23. Well, it was rather dark, just the train men, they all had lanterns.

Q. 24. State whether or not there were any other lights on the platform, except the lanterns as stated?

171 Objected to as leading, incompetent, irrelevant and immaterial, not responsive to any issue in the case, and calling for

a conclusion of the witness. Objection overruled. Defendant excepts.

A. 24. I did not notice any.

Q. 25. Did you see a truck on the platform that night?

Objected to as incompetent, irrelevant and immaterial, not responsive to any issue in the case, the witness not being legally qualified to answer the question, and for the further reason that the witness did not, according to his own testimony, get out on to the platform until after the accident had occurred, if any did occur. Objection overruled. Defendant excepts.

A. 25. Yes sir, I saw a truck.

Q. 26. Where was it standing with regard to the train?

Objected to for the same reasons interposed to the last question. Objection overruled. Defendant excepts.

A. 26. I do not know; it was on the platform; I do not know how far back it was.

Cross-examination.

By Mr. Asr:

Q. 1. Were you in the same car that Mrs. Calhoun was in?

A. 1. Yes sir.

Q. 2. Was the car lighted?

A. 2. Yes sir.

Q. 3. Did you notice the car back of the car in which Mrs. Calhoun was riding?

A. 3. No sir.

Q. 4. Do you know whether it was lighted or not?

A. 4. I do not know.

Q. 5. Did you pay any attention to the bay window of the depot?

A. 5. No sir.

Q. 6. You did not notice whether there was any lights in the bay window of the depot or not?

A. No sir.

Q. 7. The train men had lanterns?

A. 7. Yes sir.

172 Q. 8. In your best judgment the train stopped at Edmond about five minutes?

A. 8. That is my judgment. It might have been longer, it might not have been so long.

Q. 9. You say the train started about the time that Mrs. Calhoun got to the door?

A. 9. Yes sir.

Q. 10. Was she carrying the child when she started to the door?

A. 10. I think she was leading it.

Q. 11. And the child was walking?

A. 11. Yes sir.

Q. 12. When she started to the door with the child, was she alone or was there someone with her?

A. 12. I think there was another lady with her.

Q. 12. What was the other lady doing?
A. 13. Just walking along with her.
Q. 14. Were they engaged in conversation?
A. 14. Not that I heard.
Q. 15. As a matter of fact, as she was going to the door, leading the child, another woman was walking along with her?
A. 15. Yes sir.
Q. 16. And she was going leisurely?
A. 16. After she found out it was Edmond then she walked up pretty brisk.
Q. 17. When she got to the door did you hear her say anything to anybody?
A. 17. No sir.
Q. 18. Did you or anybody say anything to her?
A. 18. No sir.
Q. 19. Well, now, you feel positive that about the time she got to the door the train had started?

Mr. CAMPBELL: I object to the form of that question, calling for a conclusion and not a statement of facts.
(Objection waived.)

A. 19. Yes sir.
Q. 20. You do not know then anything about the immediate circumstances surrounding the accident to the child?
A. 20. No sir.
173 Q. 21. How much baggage did Mrs. Calhoun have?
A. 21. I did not notice any.
Q. 22. So far as you observed she was just leading the child alone?
A. 22. Yes sir, I did not observe whether or not she had any grip with her.
Q. 23. Did you notice whether or not this woman who was with her was carrying any baggage?
A. 23. I did not notice any.
Q. 24. Did that constitute the party that started towards the door at the same time that Mrs. Calhoun and the baby and this woman that was with her?
A. 24. Yes sir.
Q. 25. Did you know who the woman was?
A. 25. I do not know.
Q. 26. Did you or not get off at Edmond?
A. 26. Yes sir, I got off on the platform, but I got on the train again.
Q. 27. What was your destination?
A. 27. Oklahoma City.
Q. 28. You had gotten on at Guthrie?
A. 28. Yes sir.
Q. 29. Do you remember whether or not the train stopped at any point between Guthrie and Edmond?
A. 29. No, I do not. I do not remember whether it stopped or not.
Q. 30. Do you remember whether or not it stopped at Seward?

I object to that as immaterial. (Objection waived.)

A. 30. No sir.

Q. 31. Do you know whether or not it stopped at Waterloo?

Same objection. (Waived.)

A. 31. I do not remember whether it stopped or not at either station.

Q. 32. What is your best recollection about it?

Same objection. (Waived.)

A. 32. About the train stopping?

Q. #2. Yes sir, between Guthrie and Edmond.

A. 33. Well, I do not know.

174 And thereupon the plaintiff introduces the deposition of J. S. Dow, a witness on behalf of the plaintiff, who being first duly examined, cautioned and solemnly sworn to testify to the truth, the whole truth and nothing but the truth, relating to the said two cases, deposes and says:

Examined on behalf of the plaintiff by Mr. R. M. CAMPBELL:

Q. State your name?

A. J. S. Dow.

Q. Where do you live?

A. I live in Kingfisher County.

Q. Do you remember the occasion of an accident to a little boy at Edmond in August, 1903, one night?

A. Yes sir.

Q. Were you on the train?

A. Yes sir.

Q. Were you riding in the same car where the lady and little boy were riding?

A. Yes sir.

Q. Where did you board the train?

A. At Guthrie.

Q. What was your destination?

A. Oklahoma City.

Q. Did you see the lady and little boy as they were leaving the car at Edmond?

A. Yes sir. I saw her as far as the door.

Q. As she was leaving the car?

A. Yes sir, she was coming out.

Q. Was she carrying the child or was the child walking?

A. I would not say positively, but I think the child was walking, but I would not say positive.

Q. Did you see the woman and child?

A. Yes sir, the lady she spoke to me.

Q. Did she say anything as she was in the act of leaving the car?

A. I was in the front part of the coach and as she came along she asked if this was Edmond, and I said yes ma'am.

Q. Did she leave the car immediately when it stopped at Edmond?

A. No sir.

Q. About how long in your opinion did the train stop at the station?

A. Well, I could not say, I should judge probably somewhere from two to five minutes. Of course I could not say for certain.

175 Q. At about what period of that stop did this lady start to leave the car?

A. Well, I was in the front part of the coach but I was facing back you know, and I saw her about middle way of the car, and as she came along, she said, is this Edmond, and I said yes ma'am. Just as she got to the door it began to start, just began to move slowly, but it began to move. Just about the time she got to the door.

Q. Did you observe whether the porter or any other member of the train crew called the station as you approached Edmond?

Objected to by the defendant as incompetent, irrelevant and immaterial, not responsive to any issue in the case, not in any wise contributing or tending to contribute to the injury complained of, if any injury occurred, and to the form of the question, and for the further reason that the witness has not been legally qualified to answer the question, also because calling for a conclusion of the witness. Objection overruled. Defendant excepts.

A. No, I did not hear them.

Q. Was the station called by the porter or any member of the train crew in the car where you were riding?

Objected to for the same reasons interposed to the last question. Overruled. Defendant excepts.

A. I did not hear them.

Q. Are you familiar with the ordinary manner in which railroad stations are called as the trains on this line approach them?

Objected to as immaterial. Overruled. Exception.

A. Yes sir, I think so; I frequently ride on the train.

Q. If this train had been called in that manner as you state, at Edmond, in the car in which you were riding would you have heard it?

Objected to by the defendant, first to the form of the question leading, incompetent, irrelevant and immaterial, not responsive to
176 any issue in the case. The question as to whether or not the station was called not in any way contributing or tending to contribute to the accident, if any occurred, calling for a conclusion of the witness, and the witness not having been legally qualified to answer the question. Objection sustained. Plaintiff excepts.

Q. Were you in the same car that this lady and little boy left?

A. Yes sir.

Q. Did you leave the train at Edmond before or after the accident?

A. After the accident.

Q. You left it?

A. Yes sir, after the accident.

Q. Where did you go?
A. Out on to the platform.
Q. Did you go to the point where the injured child was?
A. Yes sir, as near as I could get there. There were quite a crowd.
A. Was it light or dark?

Objected to as incompetent, and immaterial, not responsive to any issue in the case, and being addressed to a time subsequent to the time when the accident occurred. Objection overruled. Defendant excepts.

A. Why, my recollection is that it was not very light. I know the conductor had a lantern and he was writing by it when I went out. I do not remember of any station lights. I do not remember of any.

Mr. Asp: The defendant moves the court to strike out the answer to the question as incompetent, irrelevant and immaterial, and not responsive to any issue, and as a conclusion.
Motion denied. Defendant excepts.

Q. Describe the lights that were upon or over that platform as you observed them, if any.

Objected to, first to the form of the question, as incompetent, irrelevant and immaterial, the question being addressed to a time subsequent to the time when the accident occurred, if any accident did occur, not responsive to any issue in the case, and for the
177 further reason that the witness has shown that he is not sufficiently informed to sufficiently qualify him to answer the question.

Mr. Campbell: I believe I will withdraw that question and ask another, I want to repeat that question later.

Q. Mr. Dow, state whether or not you heard the child scream soon after the lady had left the car?

Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case. Overruled. Exception.

A. No sir, I did not hear anything.
Q. How long was it after the lady had left the car before you went out on the platform?

Objected to as incompetent, irrelevant and immaterial, and in no way responsive to any issue in the case, or throwing or tending to throw any light upon the accident, if any accident did occur. Objection overruled. Defendant excepts.

A. As near as I can remember three to five minutes before I went out.
Q. After the train stopped the second time?
A. Yes sir.
Q. Now describe the lights, if any there were, on or over the platform?

Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case, the question relating to a time so far subsequent to the happening of the accident, if any accident did

occur, as not to form any part of the *res gestæ*. Objection overruled. Defendant excepts.

Cross-examination by Mr. Asp:

Q. Who, if any one went to the door of the car with this woman and little child?

A. I think there was a lady, but then I could not say who it was.

Q. Did you observe whether or not Mrs. Calhoun and this lady were engaged in conversation as they were walking along?

178 A. I could not say: I did not hear any conversation.

Q. Did you notice what, if any, baggage Mrs. Calhoun was carrying?

A. I do not remember of any.

Q. Did you notice whether or not the lady who was with her was carrying any baggage for her?

A. I could not say.

Q. You are not positive whether she was carrying the child or not?

A. No, I could not say for certain. I think the child was walking but I could not say for certain.

Q. Your best judgment is that the child was walking?

A. I think so.

Q. And she was leading it?

A. I think so.

Q. And the train started when she got to the door, you think?

A. About then.

Q. Just before or just as?

A. No, I think she was in the door. I was right close. I think the lady was in the door and I thought of her and looked around and she kept on. I just kept my seat.

Q. Did you hear her say anything after she got off the train on the platform?

A. No sir.

Q. Did you hear anybody say anything to her?

A. No sir. If I did I have forgotten it. Of course it is a long time ago, I might have heard some talk then, I do not recall it to my mind now.

Q. When the train stopped at Edmond how many persons as you now remember, got off the train?

A. I do not remember of any others getting off the train at this end of the car that I was in. I do not remember of any others.

Q. Were you in the north end or the south end?

A. Right in the south end, but I was facing the north.

Q. And as she came to the door leading the child she was coming towards you?

A. Yes sir.

Q. And facing you?

A. Yes sir.

Q. Until she passed you?

A. Yes sir.

179 Q. After she passed you she walked on to the door and then your back was to her?

A. Yes sir.
Q. Was the car lighted?
A. Yes sir.
Q. Do you remember the number of lamps in the car?
A. No sir, the car was well lighted, but I could not say as to the number.
Q. Did you notice the car back of your car?
A. No sir.
Q. This was not a chair car it was an ordinary coach?
A. It was an ordinary coach.
Q. Was any one sitting with Mrs. Calhoun?
A. I cannot say. I did not see her until she was on her feet coming towards me. I noticed her as she came along. She had this conversation.
Q. Was there any one sitting with you in the seat?
A. Yes sir.
Q. Who was sitting with you in the seat?
A. There were four of us. It was either this gentlemen here or his brother, there were four of us together, and we had two seats turned so that we were facing each other. There was a man from Oklahoma City who was talking with us.
Q. Were you engaged in conversation?
A. Yes sir.
Q. I am not seeking what it was but do you now remember the subject of the conversation.
A. No sir, I do not now have any idea what we were talking about.
Q. You were paying more attention to the conversation than you were to anything else that was going on?
A. Why, yes sir, I presume we were.
Q. Do you remember what the gentleman from Oklahoma City was talking about?
A. Not just at that time. We had been talking about,—he was a boot and shoe man, and we were talking in regard to boots and shoes, in regard to his trade. I do not know whether anything was being said just at that time or not. I could not say.
180 Mr. CAMPBELL: Did this lady that was with Mrs. Calhoun as she went to the door return into the car or did she get off?
A. I could not say.

(Unsigned.)

TERRITORY OF OKLAHOMA, *Logan County, ss:*

I, Bertha Schupp, a notary public within and for the county of Logan, in the Territory of Oklahoma, do hereby certify that the above named M. Yowell, and J. S. Dow, the witnesses whose names are subscribed to the foregoing depositions, were by me first duly sworn to testify to the truth, the whole truth and nothing but the truth, in the two causes aforesaid, and that the depositions of each of the respective parties were taken by me in shorthand and reduced to writing under the terms of the agreement hereto attached, and referred to and made a part hereof. That the same was taken on

the 26th day of November, A. D. 1904, pursuant to the annexed agreement, and that the said depositions were correctly transcribed by myself; that I am not attorney for either of said parties or otherwise interested in the event of said action, except that I am the stenographer in the office of the attorney for the defendant in said causes, which fact was waived in the agreement aforesaid. That at the taking of said depositions the said plaintiffs, Samuel Calhoun, by Anna Calhoun, his next friend, and the said Anna Calhoun, plaintiffs in said two causes, appeared by R. M. Campbell, their attorney, and the said defendant appeared by Henry E. Asp, its attorney.

In witness whereof, I have hereunto subscribed my name and affixed my notarial seal the day and year above written.

[SEAL.] BERTHA SCHUPP,
Notary Public.

My commission expires March 21, 1906.

Endorsed: 4054. Published at request of Sam Hooker, attorney and filed in district court, Oklahoma County, O. T. November 29th, 1904. B. D. Shear, Clerk, by Will H. Clark, Deputy.

181 STEVE HAYNES is the next witness called to the stand by the plaintiff, and gives the following testimony under oath:

By Mr. HOWARD:

Q. Where did you say you lived at the time of this accident?
A. Two miles northwest of Edmond.
Q. Were you frequently at Edmond?
A. Yes sir.
Q. Do you know whether there is a night agent kept at the station there or not?
A. Yes.
Q. All night?
A. Yes sir.
Q. How much of a place is Edmond?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case, and not in any way affecting,——

The COURT: Overruled. Exception.

Q. What kind of a city is it?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case, and the qualification of the witness is not shown, and as calling for a conclusion of the witness.

Objection sustained.

Q. Do you know about the size of Edmond?
A. About 2500——

Mr. ASP: Hold on now: if the court please I would ask that the witness be directed to confine himself to answering the question, and not answer so quickly.

Motion to strike out answer. Sustained.

Q. Do you know about the size of Edmond; yes or no?
A. Yes sir.
Q. About what size is it?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial not responsive to any issue in the case, and in no way affecting the liability of the defendant in this case, or the plaintiff's right to recover.

Overruled. Exception.

A. About 2500.
Q. Do you know what kind of a city it is, whether first class, village or what?

182 Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case, calling for a conclusion of the witness, and not the best evidence.

Overruled. Defendant excepts.

A. It is a first-class city.

Cross-examination.

By Mr. Asp:

Q. Did you ever take a census of Edmond?
A. No sir.
Q. Did you ever help to take a census of Edmond?
A. No sir.
Q. Did you ever try to count the people in Edmond.
A. No, I never tried to do that?

Mr. Asp: No; that is all.

Anna Calhoun (Mrs.) is the next witness called on behalf of the plaintiff, and gives the following testimony under oath:

By Mr. Howard:

Q. State your name?
A. Anna Calhoun.
Q. Where do you live Mrs. Calhoun?
A. At South Haven, Kansas.
Q. Where is that with reference to Arkansas City?
A. It is about 25 miles west.
Q. From Arkansas City?
A. From Arkansas City.
Q. Did you take the train to come to Arkansas City about the 23rd day of——
A. The 24th day.
Q. The 24th day of last August?
A. The 24th day of last August, yes sir.
Q. Had you the plaintiff in this case, Samuel Calhoun, with you?
A. Yes sir.
Q. How old was he at that time?

A. Between two and three, almost three.
Q. Did you buy a ticket?
A. Yes sir.
Q. Where did you buy it?
A. At Arkansas City, on the Santa Fe.
Q. From there to Edmond?
A. Yes sir.
183 Q. Was it a return ticket?
A. Yes sir.
Q. Had you been at Edmond previous to that time?
A. Never.
Q. Had you ever traveled along that line of railroad from Arkansas City to Edmond before?
A. No sir.
Q. Were you acquainted with the stations along the railroad?
A. No sir.

Mr. Asp: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case.
Overruled. Defendant excepts.

Q. What, if any, baggage did you have with you?
A. I had a telescope with me.
Q. About how large?
A. I think about this large, and I had an umbrella with me and a jacket, and the child.
Q. Anything else,—besides the child.
A. That was all the baggage I carried; I had a handkerchief and a pocket book in my hand.
Q. Was your ticket taken up by the conductor?
A. Yes sir.
Q. About where?
A. After having left Arkansas City.
Q. Did he give you a conductor's check?
A. Yes sir.
Q. What did you do with that, during the trip, I mean?
A. Why, I laid it around on the seat and put it inside the cover of my pocket book.
Q. Where it was exposed?
A. I laid the pocket book in my lap, and tried to keep it in view.
Q. Do you know whether the train was late that night?
A. Yes sir, it was late.
Q. About how much?
A. It was reported at the hotel at Arkansas City 20 minutes late, the hotel porter reported it twenty minutes late.
Q. The conductor's check, was that taken up from you by the conductor?
A. No, sir——

184 Mr. Asp: We move to strike out the answer as incompetent, irrelevant and immaterial, not responsive to any issue in the case, as in no way tending to prove or disprove any issues in the

case, and it being no part of the duty of the conductor to take up a check of that kind.
Overruled. Exception.

A. It was not taken up.
Q. When you got to Edmond, were you asleep or awake?
A. I was awake.
Q. Had you had any conversation with the conductor on the way down?
A. Practically none.
Q. Did you speak to him at all on the way down?
A. Yes sir.
Q. On what occasion?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial and not responsive to any issue in the case.
Overruled. Defendant excepts.

A. He came to me and said "Did I take up your transportation?" and I says, "Yes," and he says, "Where?" and I says, "Arkansas City, and I am going to Edmond," And he says, "Oh, yes."
Q. Now where were you when this conversation occurred?
A. I think it was after having left Newkirk. The station this side of the line.
Q. Well, how did you find out when you arrived at Edmond?
A. By inquiry from the passengers; I asked the passengers.
Q. Had you any information that you were getting in that neighborhood?
A. No sir.
Q. Was the station called as you approached it?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case, the witness is not qualified to answer the question.
Overruled. Exception.

A. The station was not called.
Q. How do you know that, Mrs. Calhoun.
A. Because I was listening for it.
185 Q. What did you do when you learned that you had arrived at Edmond?
A. I gathered my things together hastily, and started out.
Q. How long was that after the train stopped?
A. A very short time, I could not say just how long.
Q. Did you know any body there?
A. I have heard that the name of a lady there was Mrs. Pomeroy (?) I believe, I didn't know at the time.
Q. State whether or not you got ready hastily to get out?
A. I got ready very hastily.
Q. You may state whether any of the train crew were in the car at the time?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial.
Overruled. Defendant excepts.

A. They were not.

Q. When you got outside of the door of the car, state whether any of them were there?

Same objection by defendant. Overruled. Exception.

A. They were not.

Mr. Asp: —And not responsive to any issue in the case. Exc.

Q. Did any one assist you to alight in any way?

Mr. Asp: The same objection as last above, and no duty devolving upon the employés to assist anyone to alight.

A. I was assisted in alighting.

Q. Who assisted you, if you know, now?

A. I do not.

Q. Any body in the car?

A. All the assistance,—why some one came to me very excitedly, rushing from the depot, and assisted me off, and said, "I fear your baby is hurt."

Q. Well, that was when you finally got off the train?

A. That was when I got off the train.

Q. Well, but when the train first stopped, did any one offer to assist you to get off.

A. No sir.

Q. Did anyone take the child?

A. The child was taken in the train.

Q. Who took the child?

A. I don't know.

186 Q. Was it a man?

A. A man.

Q. That was when you first started to get off?

A. Yes sir.

Q. And was the child carried off ahead of you?

A. Yes sir.

Q. Was the child taken before the train started to move?

A. Taken off the train?

Q. No, was it taken from you?

A. Yes sir.

Q. About where were you when the train started to move?

A. Near or at the door?

Q. Of the train?

A. Yes sir.

Q. Was there any one else on the platform or on the steps?

A. I think there were.

Q. Where was the child at that time?

A. In the arms of the man that was carrying him out.

Q. When did you next see the child?

A. After the accident,—no—some one started to hand him back to me.

Q. And what did you then do?

A. I told him to keep back, I screamed as loud as I could, and he didn't pay attention; and then I motioned to him that way to keep back. (Motioning.)

Q. And the next you saw him was after the accident?

A. Yes.

Q. What kind of a child was this, was it in good health at that time?

A. Yes sir.

Q. How is it in point of intelligence,—an intelligent, bright child?

A. I think it is.

Q. Nothing at all the matter with him that you know, mental or physical?

A. Nothing whatever.

Q. Has he any brothers and sisters?

A. Yes sir.

Q. How many?

A. Three.

Q. What are they?

A. One brother and two sisters.

Q. How old are they?

A. Eight, ten and twelve.

Q. How long have you been a widow?

A. Nearly two years.

Q. You were a widow at the time of this accident?

A. Yes sir.

Q. Do you live on a farm?

A. No sir.

Q. You live in town?

A. In town.

187 Q. Mrs. Calhoun, from the time that the train stopped there in Edmond,—you say that there were no train men in the car at the time?

A. There was not.

Q. Was it possible, after you had learned that it was Edmond and it had stopped, for you to have gotten off before it started again?

Mr. Asp: Objected to as incompeter' 'rrelevant and immaterial, and not responsive to any issue in the c..., and caling for a conclusion of the witness.

Overruled. Defendant excepts.

Q. —with you- baggage and child?

A. It seemed impossible.

Q. How long was it before the child was able to be out after this injury, Mrs. Calhoun?

A. It was in bed three weeks.

Q. You remained in Oklahoma that length of time?

—. I remained in Edmond that length of time.

Q. Then where did you go?

A. Came here; he was under surgical care for six weeks.

Q. How long was it before you returned to your home in Kansas?
A. At the end of the six weeks, when he was able for me to take him home.
Q. Did you see the truck that was near when the child was hurt?
A. At what time?
Q. At any time?
A. I saw it after the accident; I was told that he was on the truck and was led there, and he wasn't there.
Q. How was it around on the platform, as to whether it was light or drak?
A. Very dark.
Q. Could you distinguish any one there?
A. No sir.
Q. Were there persons on the platform with whom you were acquainted?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial. Overruled. Defendant excepts.

The Court: Now, that is, if you know, of your own knowledge; did you see anyone there that you knew?

188 A. I don't remember; I wasn't ready to see anyone; I didn't look for any one; I don't know.

Mr. Howard: I guess that is all.

Cross-examination.

By Mr. Asp:

Q. You say you started from South Haven on that day?
A. Yes.
Q. And went over on the train to Arkansas City?
A. Yes.
Q. And bought a ticket at the station at Arkansas City?
A. Yes.
Q. A round trip ticket?
A. Yes sir.
Q. You bought but one ticket?
A. But one ticket.
Q. You and the plaintiff, the little boy, both rode on the same ticket?
A. Yes sir.
Q. That one ticket was all that was given for the transportation of yourself and the little boy from Arkansas City to Edmond?
A. Yes sir.
Q. The conductor took up the ticket you say after they left Arkansas City?
A. Yes sir.
Q. And you again saw him after they left Newkirk?
A. Yes.
Q. After the train left Newkirk. Then he asked you if he had taken up your transportation?
A. Yes sir.

Q. Did you show him the check then?
A. No, I have no recollection of having shown it to him.
Q. Then he gave you the check personally,—didn't put it up in the window, or put it up somewhere where it would be in sight?
A. No, he just proffered it and I took it.
Q. When did you next see the conductor?
A. I don't remember.
Q. Do you remember having passed through Perry?
A. Yes.
Q. And also remember having passed through Guthrie?
A. Yes.
Q. Do you remember of hearing Newkirk called?
A. I guess I heard it called; I knew it was Newkirk, and I never had been there before, I think I heard it called.
Q. Well, do you remember hearing Ponca City called?
189 A. I think I did; I knew when I was at Ponca City; I think I heard it called.
Q. Do you remember of hearing Perry called?
A. Well, I think I heard it or saw it on the station; it was nicely lighted up at Perry, and I knew it was Perry, and I think I heard it called.
Q. There was electric lights,—the town was well lighted?
A. Yes sir.
Q. There were electric lights also at Guthrie; did you observe any?
A. I think there were electric lights also at Guthrie.
Q. And you noticed them?
A. I think I did.
Q. Do you remember of hearing Guthrie called?
A. I think it was called. I think Guthrie was called; I knew that I was at Guthrie.
Q. Now after the train left Guthrie, do you remember of the conductor coming through?
A. I don't vividly remember.
Q. Did the train stop between Guthrie and Edmond?
A. No sir.
Q. It did not?
A. No sir.
Q. It did not stop at Seward or Waterloo?
A. No.
Q. Don't you remember of the conductor coming through immediately after the train left Guthrie, and remember having some conversation with him about your check?
A. No, I didn't have any conversation with him after having left Guthrie.
Q. Did he not ask you where your check was and where you were going and you told him that you were going to Edmond, and didn't he tell you then, that Edmond was the next stop?
A. No sir.
Q. And didn't he ask you about your check, and didn't you tell

him that the check had blown out of the window, or something of that kind?

A. Oh no; no.

Q. You are sure of that?

A. I am sure of it.

Q. Now, you are also sure that in the car some gentlemen took the child and walked out with it?

A. Yes sir.

190 Q. You are sure that you didn't carry the child through the car and ask some body to take the baby?

A. No, I didn't ask for assistance,—and they took the child——

Q. —took your child from you,—a person on the platform.

A. Why, some one in the car too——

Q. —no, I am talking about the platform.

A. No, I didn't have him in my arms on the platform,—the child preceded me.

Q. Where in the car did you give the baby to the gentlemen?

A. At or near the seat.

Q. Where you were sitting?

A. Yes sir.

Q. Then you did not lead the child out?

A. No.

Q. Or didn't carry it out yourself?

A. No.

Q. And when you got to the platform, you didn't hand it off to somebody?

A. No.

Q. Well, the child was safely off the train?

A. Yes.

Q. Did you see it after it was off the train?

A. I saw it in the arms of the gentlemen.

Q. Well, did you see the gentlemen place it on the platform?

A. No, I didn't see that; I saw him leaving with it.

Q. And then you saw Carl Jones run along side of the platform?

A. Yes.

Q. With the child?

A. Yes.

Q. How was he carrying the child?

A. Carrying him this way.

Q. And do you remember of his saying to you about, "Take the child," or——

A. No.

Q. You don't remember hearing that?

A. No.

Q. Well, you still remained upon the platform?

A. On the steps, on the steps.

Q. Did you get down on the steps?

A. Yes sir.

Q. Which one of the steps were you on?

A. I would not say,—I could not say exactly.

Q. Did you get down far enough so as to take hold of the rods on either side of the steps?

A. That is the way I was holding.
Q. And you got down that far and stayed there at that time.
191 A. I remained.
Q. Then you didn't see him run against the truck, did you?
A. No sir.
Q. Why didn't you get off, following the gentlemen who took the baby?
A. The train seemed to get in motion between the child leaving and——
Q. —Well, the train was in motion, I understood you to say, when you got to the door?
A. Yes, but the child was ahead of me.
Q. Well, I say, why didn't you get off?
A. I was afraid to risk getting off a moving train.
Q. And that was the reason you did not get off?
A. Yes sir.
Q. And it was dangerous, wasn't it, under any circumstances, to try to put the child back on the train with the train running at that speed?

Mr. HOWARD: Objected to as incompetent.
Sustained. Exception.

Q. Why did you call to Mr. Jones to "keep back?"
A. Why, it looked perilous, it looked to me that the child was in peril.
Q. And that it was?
A. Yes.
Q. To try to put him back on in that way?
A. Yes.
Q. And that is what you thought about it?
A. Yes.
Q. You didn't know who the man was that you gave the child to?
A. No, I didn't know him.
Q. Did you afterwards learn who it was?
A. Yes sir, I have heard people in the room here——
Q. —Was it Mr. Robertson?
A. I think it was, just from what I heard; I didn't know him at the time.
Q. Have you met him since?
A. I have not met him since.
Q. Do you think now, that it was Mr. Robertson that you gave the child to?
A. Yes sir, I think so.
Q. Do you remember Mr. Robertson coming back after he got off the train with the child?
A. I think he did.
192 Q. And when he got on after he had taken the child off, he got on the platform of the next car south of you?
A. I think that was the position——

Q. You were riding on the south end of the coach in which you had been riding?
A. Yes sir.
Q. It was one of these long coaches?
A. Yes sir.
Q. With a sort of bridge way in the center?
A. Bridge way, yes sir.
Q. Was it a well-lighted coach?
A. Nicely lighted, yes sir.
Q. Do you remember now whether there was a light right on the steps of the vestibule?
A. I don't remember.
Q. You don't remember?
A. No sir.
Q. There was a lady went to the door with you was there not?
A. I have no recollection of that.
Q. If there was, you don't now remember?
A. No, I don't remember.

Plaintiff rests in chief.

Whereupon defendant files a demurrer in writing to the evidence of the plaintiff, which demurrer is overruled by the court, to which ruling the defendant excepts. That said demurrer is in words and figures as follows, to wit:

193 In the District Court of Oklahoma County, Oklahoma Territory.

No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Demurrer to Evidence.

And now comes the above named defendant and demurs to the evidence of the plaintiff introduced herein, upon the grounds and for the reason that the evidence introduced by the plaintiff herein is not sufficient and does not prove or tend to prove a cause of action in favor of the plaintiff and against the defendant.

HENRY E. ASP,
GEO. M. GREEN,
Attorneys for Defendant.

Endorsed: No. 4054, District Court, Oklahoma County. Samuel Calhoun by Anna Calhoun, his next friend, plaintiff *vs.* The Atchison, Topeka and Santa Fe Railway Co. Defendant. Demurrer to Evidence. Filed Dec. 1st, 1904. B. D. Shear, Clerk by E. Armstrong, Deputy.

4:15 P. M. Ten minutes recess.

Whereupon, all parties being present in person and by their attorneys, the defendant introduces its evidence as follows:

J. G. JACKSON, is the first witness called to the stand by the defense, and gives the following testimony under oath:

By Mr. ASP:

Q. Where do you live?
A. Newton, Kansas.
Q. How long have you lived in Newton, Kansas?
A. One year.
194 Q. What is your business?
A. Railway conductor.
Q. How long have you been engaged in railroading?
A. Since November 1886.
Q. During any portion of that time have you been engaged as a passenger conductor on a passenger train?
A. Yes sir.
Q. Were you a conductor on No. 405 on the night of August 24th, 1903?
A. I was, sir.
—. I mean the train upon the occasion of the accident that has been testified to here?
A. Yes sir.
Q. Do you remember of Mrs. Calhoun and the little boy getting on the train any where, and if so where?
A. I remember them boarding the train at Arkansas City.
Q. Do you know where her destination was?
A. Edmond, Oklahoma.
Q. Did she have a ticket?
A. She did.
Q. Do you remember what kind of a ticket it was?
A. I do not.
Q. Whether it was a one-way ticket or a round-trip ticket?
A. I do not.
Q. Was there any one with her?
A. A little boy.
Q. That ticket was all the transportation she had, was it?
A. Yes sir.
Q. The boy and she were both carried on that ticket?
A. Yes sir.
Q. Do you remember seeing her on the train?
A. Yes sir.
Q. Did you have any conversation with her at any time on the train?
A. At Guthrie, after we left South Guthrie, the first time I had a conversation with her.
Q. Now, Mr. Jackwon, you may state in your own way just what that conversation was?
A. Well, leaving South Guthrie,—we stopped at South Guthrie for coal and water, and pulling out of there, and working on the

train,—I worked the smoking car, which was ahead of the
195 *train* she was in; probably got out of Guthrie three or four miles before I got to the car she was in; came into the first class car and worked the train up to her, and came to her, and she showed no check, or I didn't see any; I remembered of her being on the train before, and I asked her where her check was, and where she was going, and she said the check had been lost,—it blew out of the window, or some thing, and that she was going to Edmond, and I said that was the next stop. I told her there that Edmond was the next stop,—yes that Edmond was the next stop.

Q. Did you have any other conversation with her at that time?

A. No sir.

Q. Did you have any other conversation with her from that time until after the accident?

A. No sir.

Q. The train didn't stop between Guthrie and Edmond?

A. No.

Q. That night?

A. Not that night.

Q. When the train got to Edmond what did you do?

A. I got off the front end of the smoking car.

Q. Had you gone through the train before?

A. I had come from the rear end, I was coming through the train when it whistled for town.

Q. Did the train stop at any other station between Guthrie and Edmond?

A. No sir.

Q. Who composed the train crew?

A. Myself and the porter, Kennedy, and the brakeman, Benfer.

Q. That was all of the train crew except the fireman and engineer?

A. Yes sir.

Q. As you were going through the train did you meet the porter anywhere?

A. As I was coming out of the first class car into the smoking car I met the porter going back,—met him in the door as I went out.

Q. Going back towards the rear end of the train?

A. Yes sir.

196 Q. He would go through that car?

A. Yes sir.

Q. Do you know what the purpose was in going through the car at that time?

A. To call the station.

Q. Was it part of his business to call the stations?

A. Yes sir.

Q. You didn't hear him call the station?

A. I did not.

Q. Because you were not in the car?

A. I was not in the car.

Q. Just describe what you did after you got off the train?

A. When I got out there on the sidewalk—platform, I stayed at the head end of the smoking car, until the passengers were coming out of the smoking car, and I went up to the express car where they were loading baggage and express.

Q. Do you remember whether or not there was any express to be loaded at that station that night?

A. Yes——

Q. —and, if so, what?

A. A truck load of peaches.

Q. To be loaded into the express car?

A. Yes sir.

Q. Was there any express unloaded that you know of?

A. I could not say as to that.

Q. Was there any baggage loaded or unloaded that you remember?

A. I don't know that, I don't know that there was.

Q. After the express and baggage was loaded did you see, or did you see while it was being loaded, the porter Kennedy?

A. Well, I think the porter was inside the car taking the peaches back.

Q. Did he come there for the purpose of helping to load and unload the baggage and express?

A. Yes sir.

Q. Was that a part of his duty?

A. It was after the passengers were off.

Q. And you remember of his being there?

A. I do.

Q. After the baggage and express was unloaded, where
197 did Kennedy go to?

A. Well, I didn't know; I didn't see him.

Q. You didn't see where he went to?

A. No sir.

Q. Do you know whether he went up in the front end of the train?

A. I think he went around the front end of the train, from the head end of the mail car.

Q. Well, after the baggage and express was loaded and unloaded, what did you do then?

A. I cried, "all aboard," and in a few minutes,—well, a few seconds, I gave the sign to the engineer.

Q. What did you do after you called, "all aboard," and before you gave the sign to the engineer?

A. I went back along the train to see if everything was secure.

Q. Did you see anybody?

A. I didn't see anybody close to the train.

Q. Did you see the plaintiff at that time or his mother?

A. I did not.

Q. Did you know at that time that they were trying to get off of the train?

A. No sir.

Q. Did you observe, now, when you gave the engineer the signal

to go on, did you observe anybody getting on or off any of the cars?

A. I did not, no sir.

Q. Could you see down along the cars?

A. Yes sir.

Q. Were all the cars lighted in that occasion?

A. Yes sir.

Q. Was the smoking car lighted?

A. Yes sir, it was a double car, a partition in it.

Q. What kind of a car was it in which the plaintiff was riding?

A. It was one of the big new cars, with an arch through the center of the car.

Q. How was it lighted?

A. Pinch gas.

—. Is that or not a good light?

A. Yes sir.

Q. How many of those lights was there inside of that car?

A. There were six in the body of the car to the platform, and one on the platform.

198 Q. There was on in the vestibule at each end?

A. Yes sir.

Q. One on the platform at each end?

A. Well, the vestibule is the platform,—the platform is the vestibule; there is one in the vestibule, the platform, and then there is a little aisle there between the door and the body of the car——

Q. There is one in there also?

A. Yes sir.

Q. So there were ten of these Pinch gas lights in the car?

A. Yes sir.

Q. And on the platform of the car?

A. Yes sir.

Q. Where is the light on the platform of the car with relation to the steps?

A. Right over the steps.

Q. Right over the platform from which the steps lead down?

A. Yes sir.

Q. And that was the kind of a car that you had that night, and that was the kind of a car that the plaintiff and his mother were riding in?

A. Yes sir.

Q. Where was the brakeman, Benford, at that time?

A. He was in the rear end of the sleeper.

Q. Was that his proper place at that time?

A. Yes sir.

Q. What was his business in the rear end of the sleeper?

A. That was the place he stayed, in the rear end, in case of emergencies, so that he could go and protect the rear end of the train.

Q. Was he in a position to know whether or not the plaintiff and his mother, or either of them were attempting to alight from that train at the time it started?

A. No sir.

Q. What constituted the make-up of that train?

A. Next to the engine there was a postal mail car, then comes two baggage and express cars, and then there comes the smoking car,—the combination colored and white smoking car used in Texas, and then there came one of the big new first class coaches, and then the chair car and the sleeper.

199 Q. And that constituted the make-up of the train?

A. Yes sir.

Q. Do you know anything about the surroundings at Edmond, the depot?

A. I know of the depot, yes sir.

Q. And the platform?

A. Yes sir.

Q. Do you know where the south end of the car in which the plaintiff and his mother were riding stopped, with relation to the bay window of the depot?

A. Well, the front end of the car was about the bay window.

Q. It might have been a little north or a little south of the bay window?

A. I wasn't at the front end of the car.

Q. Was there a light in the bay window, do you know?

A. Yes sir.

Q. And lights from the cars?

A. Yes sir.

Q. Shining out on the platform?

A. Yes sir.

Q. After the accident,—or when did you first learn of the accident?

A. Just as we stopped, I got on the front end of the coach, the smoking car, and I could see a commotion at the front end of the big car, the first class car, and I ran back through the coach, and somebody says, "There is a lady wants off," and I pulled the signal and they stopped.

Q. And in the meantime the accident had happened?

A. Yes sir.

Q. You didn't know at the time that you pulled the bell cord that the accident had happened, did you?

A. I didn't know that there was any accident, I thought there was a lady wanted to get off.

Q. Well, where was the north end of the train after it stopped—after the accident?

A. About ten feet south of the water tank.

Q. That is, the sleeper was ten feet south of the water tank?

A. Yes sir.

200 Q. (Handing him plat.) Take this plat please, is that a correct plat of the surroundings there, as near as you can remember it?

A. Yes sir.

Q. Then after the accident, after the train had pulled out, all of the cars, of that train were south of the water tank?

A. Yes sir.

Q. And the water tank there, as shown on that, is about how far from the depot?

A. Well, it is probably 150 feet.

Q. Where is it with reference to the end of the platform?

A. Just off of the end of the cinder platform.

Q. Now there is an extension platform made of cinders is there?

A. Yes sir.

Q. There is a part of the rest of the platform that is screenings and a part of it is planks?

A. Bridge stringers, yes.

Q. How wide was the bridge stringer portion of the platform?

A. Probably four feet wide, enough to pull a truck on.

Q. Did you see a baggage truck?

A. I don't know that I did.

Q. Well, it was being used there when they were loading and unloading their baggage and express, wasn't it?

A. They were unloading an express truck of peaches.

Q. The peaches were on an express truck?

A. Yes sir.

Q. And you do not know whether you saw a baggage truck or not?

A. No sir, I don't remember.

Q. Well, where, now, with relation to the cinder platform, did that train first stop for passengers to get on and off,—I mean where were the passenger cars?

A. The passenger cars was probably,—the smoking car was probably 40 feet from the end of the cinder platform, north towards the depot.

Q. Fort*h* feet north?

A. Yes, very probably longer than that,—the length of two long coaches.

201 Q. Then the first class passenger coach or this large day coach as you call it, was still north of that?

A. Yes sir.

Q. And the chair car was still north of that?

A. Yes.

Q. And the sleeper was still north of that?

A. The sleeper was the rear car, yes sir.

Q. Well then, if the truck was left down there on the cinder portion of the platform, was it or not left at a place provided for passengers to get on and off of that train?

A. It was not.

Q. It was not?

A. No sir.

Q. How far was it approximately from the place where passengers would get off and on the train?

A. Probably fifty feet.

Cross-examination.

By Mr. HOWARD:

Q. You always stop at the same place, do you?
A. At stations?
Q. That station?
A. Yes sir.
Q. It doesn't vary to speak of?
A. None to speak of, no sir.
Q. What is the cinder platform for?
A. Well it is inclined down from the platform where the stringers are.
Q. What is it there for?
A. Well, it is there to pile truck on, throwed in and out of the baggage car.
Q. That is all it is there for?
A. Yes sir.
Q. It has no other purpose?
A. None that I know of.
Q. And the other platform, what is that for, the wooden platform?
A. That is for passengers to board trains and get off.
Q. When the train would come from the other way and stop at that station, where would the smoker be with reference to where the one was this night?
202 A. It would be on the cinder platform at the other end.
Q. So that the people wanting to get on to the chair car or into the sleeper would come back this way to get on if it was going the other way?
A. Yes sir.
Q. And it would be reversed depending on which way you went?
A. Yes sir.
Q. And the difference from the place where they would get on would be the distance from one car to the other?
A. Yes.
Q. And about how long is that platform?
A. Probably 200 feet.
Q. How long is the wooden platform?
A. I don't know the exact length.
Q. As much as 100 feet?
A. I should judge so, yes sir.
Q. You don't think it is more than that do you?
A. No, I don't think it is.
Q. How long are those cars?
A. The passenger cars?
A. Yes.
A. Well, they vary; for instances that new car that we had on that night, was sixty feet inside.
Q. How long was the smoker that you had on that night?
A. Fifty feet.
Q. How long was the chair car?

A. I think the chair car was a sixty foot car.

Q. Now did you have any others that carried passengers except the sleeper?

A. No sir.

Q. How long was the sleeper?

A. Sixty feet.

Q. Now will you please explain to the jury, when the train, the passenger cars, the length of them, are 230 feet,—please tell the jury, how they could get those several cars along on that wooden platform?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.

Overruled. Exception.

203 A. Well, they would have a part of the cars on the platform, and they could go through the train, or get out off of the platform.

Q. And they would have to get in at one end or the other?

A. Yes sir.

Q. And quite frequently they go on to the conders to do that?

A. Yes sir.

Q. Well, as a matter of fact that cinder platform is there for that purpose, it is not, as much as any other?

A. Why yes sir.

Q. Now where were you when the train stopped that night?

A. I was on the front end of the smoking car.

Q. What was the first thing you did after the train stopped?

A. I got off on to the platform.

Q. And then what?

A. I stayed at the head end just a few minutes and went to the baggage car——

Q. About how many minutes?

A. About a minute.

Q. About a minute at the head end of the smoker and then went to the baggage car?

A. Yes sir.

Q. What did you do there?

A. I stated there and superintended the loading of the peaches.

Q. About how long did that take you?

A. About three minutes.

Q. Then what did you do?

A. Cried "all aboard."

Q. Then what did you do?

A. Looked up and down the train and see that everything was clear, and gave the signal.

Q. Gave it right there from the baggage car, did you?

A. From the baggage car, yes sir.

Q. Gave it right from there?

A. Yes sir.

Q. And you didn't know as a matter of fact whether a single

passenger after you had pulled into Edmond, had gotten off of the train, did you?

204 A. I seen them getting off, yes sir; I saw them when I was standing at the front end of the smoker.

Q. And you didn't go back behind the front end of the smoker, did you?

A. No sir.

Q. Then how did you expect to know whether they were off or not?

A. Because the porter was there helping them off.

Q. Didn't you state awhile ago that the porter was helping to load the peaches?

A. After the passengers had gotten off, yes.

Q. How did you know that they had all gotten off?

A. Well, they had quit coming out of the car.

Q. How do you know that?

A. Because he would not have left there until they had.

Q. How do you know he would not?

A. Because he never does.

Q. Never does; never fails to call the (stations) *cars* either does he?

A. I never knew him to.

Q. You didn't know of these things yourself at all; you didn't know as a matter of fact anything about what did transpire back of that part of the cars?

A. I didn't know; I just supposed that the passengers had all got off.

Q. You just supposed that they had got off, and gave the signal and started on?

A. Why, I suppose passengers get off when the train stops.

Q. You take that for granted usually, do you?

A. Yes.

Q. And make no effort to ascertain whether it is true yourself or not?

A. I didn't go through to see no sir.

Q. Even if there is a lady and a small child as in this case, you pay no attention at the station to them at all?

205 Mr. Asp: Objected to as incompetent, irrelevant and immaterial, and not responsive to any issue in the case.

Overruled. Defendant excepts.

A. Well, when a woman with a baby asks for assistance, or have more than they can carry, I always tell the porter to see that they are helped off.

Q. Well, if you are not in the car when you arrive at the station, how do you know whether they are asking for assistance or not?

Objected to as incompetent, irrelevant and immaterial, and not proper cross examination. Sustained. Plaintiff excepts.

Q. You did not know whether this lady wanted or needed any assistance at all, did you?

A. No sir.

Q. Now, you say you had a conversation with her about the time you left Guthrie?
A. After we left South Guthrie, yes sir.
Q. That was on the 24th day of August a year ago?
A. Yes sir.
Q. Did you have a conversation with any other passenger that night on that train?
A. I don't know, not that I know of.
Q. Did you have a conversation with any passenger the night before, that you know of?
A. Not that I know of.
Q. Or the day before that?
A. I don't remember.
Q. Or at any time within a month?
A. I don't remember.
Q. This is the only one you can remember, is it?
A. Yes sir.
Q. She told you that the ticket had blown out of the window or got lost somewhere?
A. Yes sir.
Q. Did you make any further enquiry as to where it was?
A. No sir.
Q. You take them up before you reach the station where they are getting off don't you?
A. I do if I can find them.
206 Q. That is the custom, always, is it?
A. Yes.
Q. And you do that about as punctually as the porter is supposed to lend his assistance in helping them off?

Form of the question objected to. Sustained.

Q. You do it always?
A. I do it always before the last station at which the train stops.
Q. Do you remember the circumstance of a young man that got off at Edmond coming and giving you his check after the train stopped?
A. No sir.
Q. You don't remember that circumstance?
A. No sir.
Q. You don't remember whether you got any checks after that occurred or not?
A. No sir, I don't remember; they nearly all got on at Guthrie.
Q. Well, would not you give them a check at Guthrie?
A. No sir.
Q. Isn't that customary?
A. No sir.
Q. Never is done, eh?
A. No sir.
Q. You don't give tickets in coming from Guthrie to Edmond?
A. No sir.
Q. How about in coming from Guthrie to Oklahoma City?
A. Yes, I give checks.

Q. But not to Edmond?
A. No sir.
Q. That is because there is no stop between them, is it?
A. No stop, no sir.
Q. You say when the train stopped, you were at the front end of the smoker, and that you stayed there about a minute?
A. Yes sir.
Q. Did you see the porter assisting anybody to get off the train that night?
A. I seen the porter at the steps of the big car between the smoker and the first class car.
Q. How long did you see him there?
A. I could not say for sure how long.
Q. You could not estimate it?
A. Probably a couple of minutes.
207 Q. He stayed there longer than you did at the smoker, did he?
A. Yes sir.
Q. He didn't come to help with the peaches until after——
A. —I don't think that he left there until I called him.
Q. Well, did you know that the passengers had gotten off when you called him?
A. Well, I don't know.
Q. Well, it is his absolute duty and his instructions to assist passengers in getting off and on trains, isn't it?
A. Yes.
Q. And it is one of his special duties?
A. Yes.
Q. And in any circumstances in which he fails to do that, he fails in the performance of his duties——?

Mr. Asp: We object to the form of the question.
Sustained.

Mr. Howard: I believe that is all.

Redirect examination.

By Mr. Asp:

Q. Mr. Jackson, on cross examination they asked you if you could remember any other conversation that you had with any other passenger that night; now I will ask you why you remember the particular conversation that you had with Mrs. Calhoun that night?
A. Well, sir, because when I went back and saw the child was hurt, it came to my mind that it was the lady that I had had the conversation with,—that got on at Arkansas City?
Q. And it was the fact of the accident that rivited the fact of the conversation?
A. Yes.
Q. You say you called the porter up to come and help with the baggage and express?
A. Yes sir.

Q. He asked you if you knew then that the passengers were all off; did you see any passengers getting off at the time you called the porter?

A. No, I didn't see any getting out of the train.

Q. Was any one getting on the train?

A. No sir.

Q. And you called him then to get out the baggage and express.

A. Yes sir.

208 By Mr. HOWARD:

Q. Where were you at the time you called him?

A. I was standing at the express truck.

Q. And where was he?

A. At the head of the first class coach.

Q. And you called him after the people quit getting on and off the train?

A. Yes sir.

Q. And then he came up to the baggage car and assisted in loading the peaches?

A. Yes sir.

Q. And how long was it after he came up before the train started?

A. Well, it could not have been over a minute.

Q. You think about a minute after he came up there before the train started?

A. Yes sir.

Q. By the way, did you stop at Seward that night?

A. No sir.

Q. Did a passenger get on while you were in motion there?

A. I don't know how one could.

Q. You didn't check up there?

A. No, we didn't slow down at all.

Q. You don't know whether any passenger got on there at all?

A. No sir.

By Mr. ASP:

Q. How fast were you going through Seward?

A. Thirty five or forty miles.

Q. Could it have been possible for a passenger to get off?

A. Not and live.

5:45. Here court adjourns until 9 o'clock to morrow morning.

December 2nd, 1904, 9 A. M. Court convenes pursuant to adjournment with all parties present in person and by counsel, and this trial is resumed as follows:

J. A. BENFER is the next witness called to the stand by the defense, and gives the following testimony under oath:

By Mr. ASP:

209 Q. Where do you live Mr. Benfer?

A. Newton, Kansas.

Q. How long have you lived in Newton, Kansas?
A. For 22 years.
Q. What business are you engaged in?
A. Brakeman on a passenger train.
Q. On the railroad of the defendant?
A. Yes.
Q. How long have you been engaged as such brakeman?
A. About nine years.
Q. Were you a brakeman on train No. 405, on the night of August 24th, 1903, or the night that this accident is alleged to have occurred?
A. I was.
Q. Where were you on the train that night?
A. I was at the rear end of the train.
Q. What are your duties as brakeman?
A. Well, the duties is to check up all the switch lights burning, and them that ain't burning, leaving Edmond and all stations.
Q. When a train stops at a station what are your duties?
A. My duties is to take the time from the time it stops until it leaves, and to protect the rear end of the train.
Q. Now state to the jury what you mean by protecting the rear end of the train?
A. Well, in stopping at stations where there is no yard lamps, I am supposed to be down on the ground with a red light and a white light, to protect the rear end of the train.
Q. Do you mean to protect it from collision with other trains?
A. Yes sir, when we stop at a station more than five minutes, I am supposed to go back——
Q. —Go back on the track?
A. Yes.
Q. And stop any train that may be coming?
A. Yes.
Q. You remember when you were on the train that night?
A. Yes sir.
Q. Did you or not keep a record of the time?
A. I did.
Q. At that time?
A. Yes.
Q. (Handing witness book.) What is that book Mr. Benfer?
A. It is a train book.
210 Q. Have you in that book the record of your train?
A. Yes.
Q. Did you make that record?
A. I made that record myself.
Q. Is that record correct?
A. Yes sir.
Q. You may turn to that particular record which shows the arrival and departure of that train at and from Edmond,—well, just identify the book; have you the place there?
A. Yes sir.

(Counsel for other side examines same.)

Q. Now, from the book, you may refresh your memory and state when the train arrived at Edmond?

A. It arrived at 11:34.

Q. Now, from the book, you may refresh your memory, and state when the train left Edmond,—that is, when it started out to leave Edmond before the accident?

A. Well, we stopped there at 11:34 and laid there four minutes, and then we started out again.

Q. Now at what time was that record made by you in that book?

A. Yes sir.

Q. I say, at what time was it made?

A. It was made at 11:34, when we stopped.

Q. Before the circumstance of the accident?

A. Yes.

Q. Was the time of leaving as it appears in that book, recorded there before or after the accident?

A. Before the accident.

Q. Just as the train started out?

A. Yes sir.

Q. Now how do you know that is correct?

A. Because I know it is correct; I put it down there myself, and put it down when we stopped.

Q. Did you have a watch?

A. Yes sir.

Q. When the train stopped, did you look at your watch before putting it down?

A. Yes sir.

Q. And did you look at your watch before the train started?

A. The conductor gave the engineer the signal, and started and I stepped up on the first step of the sleeping car, and just as soon as we started why I put it down in my book.

211 Q. And then, afterwards, the train stopped again?

A. Yes sir.

Q. When did the train finally leave?

A. It left at 12:07.

Q. Stopped there on account of the accident?

A. Yes sir.

Q. Now, as you were at the rear end of the train with your red light and with your white light as you call it, did you look down alongside of the train?

A. Yes sir.

Q. Could you see people down on the platform?

A. I could see people on the platform; the lights of the cars shine out on the platform so that I could see.

Q. Did you observe a light in the bay window of the depot?

A. Yes sir.

Q. And from the light in the bay window of the depot and from the lights shining out from the cars, you could see persons down on the platform?

A. Yes sir.

Q. Now, do you know what the make-up of that train was that night?

A. There was a mail car and two express cars—a baggage car and an express car—and a smoker and a day coach, and a chair car and a sleeper.

Q. Now, I want to get that clearly, repeat it again? You say there was a mail car, where was that in the train?

A. Right behind the engine.

Q. What car next followed the mail car?

A. The baggage car.

Q. And what car followed that?

A. The express car.

Q. And what car followed that?

A. The smoker.

Q. And what car followed that smoker?

A. The day coach.

Q. And what car followed that?

A. The chair car.

Q. And what car followed the chair car?

A. The sleeper.

Q. Was there any more cars in the train?

A. No sir.

Q. Have you got the numbers of the cars that constituted that train?

A. Yes sir.

212 Q. What was the number of the day coach on that train?

A. The number of the day coach was 667.

Q. Do you know what kind of a coach it was?

A. No. 667, is one of what they call a six-wheel truck, big coach.

Q. With an arch in the center?

A. Yes.

Q. Do you know how the coach was lighted?

A. It was lighted with *Pinched* gas.

Q. Do you know how many lights were in the coach?

A. Six inside.

Q. Were there any other lights?

A. Yes sir.

Q. Where were they?

A. Well, if they was all alight, there ought to have been one in the vestibule of the car, that is outside, and then one on the inside; the little room on the inside, and six on the inside of the coach where the passengers are.

Q. Then there would be ten lights in the car and on the platform?

A. Yes sir.

Q. Did you see the light in that coach over the platform that extends down the steps, alight?

A. Why there was a lamp there, but I could not say whether it was alight, because I wasn't up there.

Q. Well, those lights were kept burning weren't they?

A. Yes.

Q. Did you know at the time the train started Mr. Benfer, that the plaintiff or his mother was attempting to alight from that train?
A. No sir, I didn't know they was on the train at all.
Q. Did you know that Carl Jones had the plaintiff——

Mr. HOWARD: We object to that.

Q. —running down alongside of the train?
A. No sir.

Mr. HOWARD: He has made that statement to a number of witnesses that were not supposed to know anything about it, and that he knows do not know anything about it, and we know don't know anything about it.
(Discussion.)
Objection withdrawn.

213 Q. Did you know that any person was endeavoring or about to endeavor to put the plaintiff back on the train at the time that the train started?
A. No sir.
Q. You absolutely did not have any knowledge at all about that matter?
A. No sir.
Q. When did you first learn that the accident had happened?
A. After the train had pulled down a little to the south of the wanter-tank and stopped there.
Q. Now, where was the train stopped,—that is, where was the north end of the train on the track, when you stopped, after the accident?
A. After the accident?
A. Yes?
A. The sleeper was standing a little south of the water tank.
Q. And were all the other coaches of the train south of the sleeper?
A. At that time, yes sir.
Q. Did they stand there all the time until the train finally went on this way, to Oklahoma City?
A. Yes sir.
Q. Then, after the accident, the train did not stand up opposite the depot, as it did the time the train was first stopped?
A. No sir.

Mr. ASP: You may take the witness.

Cross-examination.

By Mr. HOWARD:

Q. Let me see that book, please, (Taking book) Is that the place where you have the time marked?
A. Yes sir.
Q. Show it to me will you please.
(Witness complies.)
Q. What does that 12:07 mean?
A. That is the time we left.

Q. Is that the only entry there?
A. 11:34 and left at 12:07.
Q. Is that all the entry there?
A. Yes sir.
Q. Well, how do you figure out that four minutes proposition?
A. Well, I kept another report.
Q. Point that out?
214 A. Mr. Jackson has got it.
Q. I thought you were reading that from this book.
A. Mr. Johnson has got the other report that belongs to this book.
Q. Oh, get it, if you please; I thought you were testifying from what is in this book.

(Whereupon Mr. Asp goes and gets the book and hands it to Mr. Howard.)

A. Eleven-thirty four and left at 12:07, four minutes first stop——
Q. Who kept this?
A. I kept it.
Q. Where did you keep it.
A. Kept it right there on my train book, kept it as I was going along.
Q. Kept this one as you were going along, or kept this one as you were going along?
A. Kept all three of them: I made the first entry on that, the brakeman's report.
Q. This one or this one?
A. That one (indic.).
Q. You made your first entry on that?
A. Yes sir.
Q. A while ago when you were reading what was in this book to the jury, it wasn't there, was it?
A. I had the four minutes on the brakeman's report.
Q. Here is another entry in your book.
A. Do you mean 11:34?
Q. That means the time that the train stopped?
A. Yes sir.
Q. And 12:07, that means the time that the train left?
A. Yes sir.
Q. Thirty-three, that indicates the whole time that the train stopped at Edmond, including the accident and all?
A. Yes sir.
Q. And there is another entry there, showing how long the train stopped at Edmond the first time, is there?
A. Not on the train book, no sir.
Q. You did not make this first entry out in the dark, standing out on the steps, did you?
215 A. Yes sir, I'll show you on the book; I had it turned around this way, and I had it in my train book like this, and I got it out of the train book, and put down the time when we stopped and when we started up I put it down here again.

Q And then put it on this other sheet and then put it on your book?

A. Yes, when I got in the car I copied it off on this.

Q. All before the accident?

A. No sir.

Q. Isn't that what you told the jury in your examination in chief?

A. Yes sir, I told *him* that I put it down there; I thought that you handed me that report there.

Q. Oh you thought you had that?

A. That is my report.

Q. Do you mean to tell the jury that you did that writing while the train was moving?

A. Yes sir.

Q. Did that while the train was going?

A. This here; this 11:34, I was standing on the ground and made it out.

Q. Made it out down on the ground?

A. Yes sir, just as soon as it stopped.

Q. How does it come that you got it in this and in this; did you transfer it from this to this?

A. When I got in the car I copied it off in the book.

Q. Why didn't you copy that like——

Mr. Asp: We object to this as incompetent, irrelevant and immaterial and argumentative.

Overruled. Exception.

Q. Why didn't you keep them alike; they are both supposed to state the truth?

A. Yes sir, they are both alike, only the four minutes ain't in that book.

Q. They are out on the margin are they not?

A. Yes sir.

Q. What kind of a pencil is that work done with?

A. An indelible pencil.

Q. Why is it that the writing looks so different in that book from what it does here?

216 Mr. Asp: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.

Overruled. Exception.

Mr. Howard: I want to exhibit these to the jury (showing same to jury). There is the entry in that book, and here is this one. (Jury examine same.)

Q. Do you say that you copied these all at the same time?

A. The brakeman- report, is the one I made out first and then put it in my train book.

Q. Right away?

A. Yes sir.

Q. And you made it just as soon as the train started?

A. Yes sir.

Q. And before the accident occurred?
A. Yes sir.
Q. How did it come that you recorded the accident in there?
A. I put the time in at the time that we stopped the second time.
Q. And then you made it again?
A. Yes.
Q. And you made two entries here on the same line?
A. Yes, when we stopped at Edmond I put it down there, and when we started the first time I put it down there.
Q. And then when you stopped again did you put it down here?
A. Well, when we left there at 12:07.
Q. Well, did you write this middle stuff here later or before you wrote this out here?—Which end did you commence at to write that.
A. I commenced right here.
Q. You wrote the wrong side first, did you?
A. "Four minutes express."
Q. Now, why didn't you fill in here; this is where that belongs, isn't it, right there?
A. I don't know as it is.
217 Q. Here you have got "Arrived at 11:34, and left at 12:07," and you don't say anything at all about the first start there.
A. Four minutes from the time that we stopped the first time.
Q. Well, that don't show it.
A. Well, that is what I put it down there for.
Q. Well, it is 11:34 and 12:07, does that make four minutes?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial. Sustained.

Q. Each one of these columns here,—one of them, the first one, represents the time the train arrived?
A. Yes sir.
Q. The next one represents the time it leaves?
A. Yes sir.
Q. And either one of them is filled in there correctly except this one, isn't it?
A. Well, it says the time that we left there.
Q. Finally, the second time?
A. Yes.
Q. But as to your leaving the first time, you didn't put that in there at all, did you, and the simple reason is that you didn't make that entry until after the accident, did you?
A. Yes, I made that before that.
Q. You put that 12:07 down there before the accident, did you?
A. No sir. The 12:07 I put down after the accident.
Q. Oh, well, then you made that in piece-meal, did you?
A. Yes sir.
Q. You made this on the first row here when you first got there, did you?
A. I made this when we arrived at Edmond at 11:34.
Q. Well, now, when you left Edmond, why didn't you state the

time there when the train first started, like you did in every other case?

A. After we started the first time——

Q. (interrupting witness) —you didn't as a matter of fact make any entry when you first started, did you?

A. Yes sir.

218 Q. Well, state to the jury why didn't you show on the margin when you made that entry, when you started the first time?

A. I don't know why I didn't.

Q. The fact of the business is that when that accident occurred it became important to make that book show that you stopped there four minutes, and you put that down afterwards——

Mr. Asp: Objected to as incompetent, irrelevant and immaterial. Sustained.

Q. Tell the jury why you stated the time in that one instance when it is not stated in any other, on the margin,—explain that to the jury.

A. I state it here wherever there is baggage and express.

Q. Yes, you state there four minutes out on the margin; is there any other time stated on that margin there?

A. No sir.

Q. Well, state to the jury why in this particular instance you stated it was four minutes, and you do not give the time in any other place?

A. Well, it was just four minutes from the time we stopped until we——

Q. —Yes, why didn't you state on that sheet another stop as well as this one, that is the question?

A. I don't know why I didn't.

Redirect examination.

By Mr. Asp:

Q. It is not a fact Mr. Benfer that in this report to the conductor, that you actually put in a report, a memorandum of this character, where there is an unusual stop?

A. Yes sir, over three minutes it was at that time.

Q. You have to report where you stop over three minutes?

A. Yes.

Q. The cause of the delay?

A. Yes sir.

Mr. Asp: That is all.

219 By Mr. Howard:

Q. Then, if you report when there is some delay, that memorandum was for the purpose of reporting that delay wasn't it?

A. Yes sir.

Q. And consequently, it was not put there until after the delay was it?

A. It could not be put down before the delay was made.

Q. Then you didn't state exactly what you meant to say, when you stated that you made this memorandum before this accident, did you?

A. It says there that it was four minutes for express.

Q. Yes, you made this statement after all of this delay, didn't you?

The COURT: Did you make the statement of the four minutes after the entire delay?

A. No sir; I made the four minutes delay after we started the second time.

Q. And you always make a memorandum of that kind where there is a delay of as much as four minutes?

A. Yes, three or four minutes.

Q. Please look at that entry there, and state how much delay there was there?

A. Well, here it is baggage and express.

Q. Well, why didn't you state the time like you did in this?

A. I think, if you figure that out it is.

Q. They could not figure the other out, could they. I wish Mr. Asp, you would not let that get away.

Mr. ASP: I am not going to let it get away; I am just as anxious to preserve it as you are.

That is all.

Mr. ASP: I now offer the deposition of Elmer B. Kennedy.

Whereupon, Mr. Asp reads said deposition, which is in words and figures as follows (omitting caption):

220 *Stipulation.*

It is hereby stipulated and agreed by and between the parties to the above entitled action that in taking the deposition of Elmer B. Kennedy, a witness for the defendant, at Newton, Kansas, on the 20th day of July, 1904, the questions propounded to said witness and his answers thereto may be taken down on a typewriting machine by Lela Ragland, a notary public, before whom said deposition is taken, and subscribed by said witness in the presence of the notary, before whom said deposition is to be taken.

It is further stipulated and agreed that the deposition of said witness taken in the above entitled cause may be used as the deposition of the said witness in the case of Anna Calhoun *vs.* The Atchison, Topeka and Santa Fe Railway Company pending in the above named court subject to such exceptions and objections as counsel may desire, to offer to said deposition or to any part thereof.

H. H. HOWARD,
Attorney for Plaintiff,

By H.
ATCHISON, TOPEKA &
SANTA FE RY. CO.,
By GEO. M. GREEN, *Attorney.*

Deposition of a witness taken to be used in the above named action pending in the above named court, wherein Samuel Calhoun, by his next friend, Anna Calhoun, is plaintiff, and the Atchison, Topeka and Santa Fe Railway Company, is defendant, in pursuance of the notice hereto attached, and at the time and place therein stated.

The said plaintiff appeared by Sam Hooker, one of his attorneys, and the said defendant appeared by George M. Green one of its attorneys, and thereupon the said defendant produced the following witness, who first being duly sworn, deposes and says as follows:

221 Direct examination.

By Mr. GREEN:

Q. State your name, age, occupation and place of residence?
A. Elmer B. Kennedy, 21 years, Newton, Kansas. Painter.
Q. Where were you employed in the month of August, 1903?
A. Train porter.
Q. Where was your run?
A. Newton to Purcell.
Q. Was you on the south bound passenger train, A. T. & S. F. on the 25th day of August, 1903, when an accident occurred at Edmond, Okla.?
A. Yes sir.
Q. State what your duties were as train porter on this run?
A. My duties were to see that passengers got off at all stations, call stations, see that cars and everything was clean, and such other duties as conductor told me to do.
Q. State whether or not the station was called the night on which you have testified you were train porter going into Edmond?
A. Yes sir.
Q. In which cars, if any, were the stations called?
A. In the smoker and day coach.
Q. Did you see the lady who got off at Edmond that evening with a child?
A. Yes sir.
Q. State whether or not you knew she was a passenger to get off at Edmond?
A. I did not.
Q. When the train arrived in Edmond on this day state what you did after the train stopped?
A. After I had called stations, I went out on the steps of the day coach with my step box.
Q. How long did you remain at this step?
A. Until I was called by the conductor to help with the baggage.
Q. How long was it?
A. I stood there about three minutes.

222 Q. After helping load the baggage where did you then go and what did you do?

A. I then went up to the engine where two or three fellows were going to get on the blind and train started up and I put them off.

Q. Do you remember in which coach this lady with the child was riding?
A. In the day coach.
Q. What car in the train was the day coach?
A. Next car to the smoker.
Q. How many cars were there in the train and name them in the order in which they were attached to the engine?
A. I cannot say.
Q. Was there a mail coach?
A. I don't remember that.
Q. Where was the day coach in relation to the smoker?
A. It was attached to the smoker.
Q. At the rear of the smoker?
A. Right behind the smoker.
Q. How many cars were behind the coach?
A. I don't know how many cars there were.
Q. Was there more than one?
A. Yes sir.
Q. Was there more than two?
A. Yes sir.
Q. State whether the lights were burning in the cars in this train?
A. Yes sir.
Q. Were they burning brightly or not?
A. Yes sir, as bright as they always do.
Q. How far out on platform did the lights reflect from this train, about how many feet?
A. I don't remember.

Cross-examination by Mr. HOOKER:

Q. When did you quit the service of the company?
A. I can't remember, now.
Q. What month?
A. I don't know that either.
Q. What year?
—. 1903.
Mr. GREEN: You left the service of the company voluntarily?
A. Yes sir.

(Signed) ELMER B. KENNEDY.

223 I, Lela Ragland, a notary public, within and for the county of Harvey, state of Kansas, do hereby certify that the above named Elmer B. Kennedy, the witness whose name is subscribed to the foregoing deposition, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the case aforesaid, and that the deposition was reduced to writing upon a typewriting machine, by me, and in the presence of said witness, and that the said witness subscribed said deposition in my presence, and the same was taken on the 20th day of July, 1904, between the hours of 8 o'clock A. M. and 6 o'clock P. M. of said day at the office of the train master of the Atchison, Topeka and Santa Fe Railway Company in the city of Newton, County of Harvey, state of Kansas, as

specified in the notice hereto attached, and that I am not attorney for either of said parties or otherwise interested in the event of said action.

In the presence whereof I have hereunto attached my notarial seal and subscribed the same.

LELA RAGLAND,
Notary Public.

[SEAL.]

My commission expires April 23rd, 1907.

Endorsed: 4054. Published at request of att'ys for pl'ff. Filed in District Court, Oklahoma County, O. T. Nov. 25th, 1904. B. D. Shear, Clerk by Will H. Clark, Deputy.

J. H. FLORENCE is the next witness called to the stand by the defense, and gives the following testimony under oath:

By Mr. ASP:

Q. Where do you live Mr. Florence?
A. Near Pauls Valley, Indian Territory.
Q. What are you doing now?
A. Not doing anything particularly.
Q. What were you doing in the month of August, 1903?
A. An operator.
Q. Operator, where?
A. Edmond, Oklahoma.
Q. For whom?
A. The Atchison, Topeka & Santa Fe.
224 Q. Do you remember of the circumstance of the accident complained of in this case?
A. Yes sir.
Q. Were you the operator at Edmond at that time?
A. Yes sir.
Q. What were your duties as operator?
A. My duties there were to do the clerical work, sell tickets, and then load baggage and express.
Q. Were you there when No. 405 came in that night?
A. Yes.
Q. That is, the 24th of August, 1903.
A. Yes.
Q. Did you have a light in the bay window at that time?
A. Yes.
Q. At the time the train came in?
A. Yes.
Q. Describe that bay window to the jury?
A. Why it is composed of three squares of windows.
Q. Three sides of glass?
A. Yes sir.
Q. Did the light from that lamp shine out through that window on to the platform?
A. Yes sir.

Q. North, south and east?
A. Yes sir.
Q. The depot there is on the west side of the track is it not?
A. Yes sir.
Q. And the track is on the east side of the depot, and on the east side of the platform?
A. Yes.
Q. Do you know W. W. Robertson?
A. Yes sir.
Q. Did you know him at that time?
A. Yes sir.
Q. Do you know Walter Melville Robertson?
A. Yes sir.
Q. Did you know him at that time?
A. Yes sir.
Q. Do you know Carl Jones?
A. Yes sir.
Q. Did you know him at that time?
A. Yes sir.
Q. Did you see those three persons there that night?
A. I only saw Carl Jones.
Q. Did you see Walter Robertson?
A. I don't remember.
Q. Or W. W. Robertson?
A. No sir.

Q. Well, when the train pulled in what did you do?
225 A. I first went to the mail box and took the mail out.

Q. Well, just go on and describe what you did in your own way?

A. I next went to the baggage car and unloaded the baggage, and went from the baggage car to the express car, and unloaded a truck load of peaches.
Q. Then what did you do?
A. I started piling the express.
Q. Now when you got through with the baggage car what did you do with the baggage truck?
A. Pulled it to one side.
Q. How far did you pull it away from the train?
A. About four feet.
Q. Where was it with relation to the wooden part of the platform, and the commencement of the cinder part of the platform?
A. The wheels of the truck were off on the cinders, and one end of the truck,—the handles of it, protruded over the board platform.
Q. And the screenings?
A. Yes sir.
Q. The screenings, and the board platform ran side by side down to the cinders, and one end of the truck was over the cinders?
A. Yes sir.
Q. And possibly some over the board platform?
A. Yes sir.

Q. You pulled it away from the baggage car?
A. Yes sir.
Q. Where was that baggage car in the train?
A. The second car.
Q. The second car from the engine?
A. Yes sir.
Q. Where was it with relation to the smoker,—the second car from the smoker, was it?
A. Yes sir.
Q. Now you say you went from that baggage car, after you had pulled the truck out, to the express car?
A. Yes.
Q. Where was the express car with relation to the smoker?
A. The first car ahead.
226 Q. The first car ahead of the smoker?
A. Yes sir.
Q. Now do you remember how much stuff you had to load there at that time, in the express car?
A. It was twenty six crates of peaches if I remember right.
Q. 26 crates of peaches?
A. Yes sir.
Q. Now did you see the conductor there?
A. I don't remember.
Q. You don't remember; you remember that you were at work, at your work?
A. Yes sir.
Q. Now when you got through loading the peaches in the express car, what did you do?
A. I started to pulling the express car out of the way?
Q. Where was you pulling it?
A. Pulling it north alongside of the depot.
Q. Now at that time did you see Carl Jones?
A. Yes sir.
Q. Where was you when you first saw Carl Jones?
A. He was opposite the door leading into the ticket office.
Q. Opposite the door leading into the ticket office?
A. Yes sir.
Q. Was that north or south of the bay window, the door leading into the ticket office?
A. South.
Q. The door was immediately south of the bay window?
A. Yes.
Q. And he was opposite that door?
A. Yes sir.
Q. Now what was he doing?
A. Walking alongside the train.
Q. Walking along, did he have hold of anybody?
A. He had what I supposed to be a bundle.
Q. A bundle?
A. Yes sir.

Q. Then what did you next observe?
A. I next observed that it was a child.
Q. Now what was he doing as he was walking,—was he running or walking?
A. He first started out in a walk and as the train got faster he got faster.
Q. And went along in a run?
A. Yes sir.
227 Q. Just describe his actions,—just what he did?
A. Well, as near as I can remember he had hold of the train with his left hand, the handle of the train, and the bundle in his right arm,—or the child.
Q. Now just describe that Mr. Florence, in your own way,—describe it just as it happened?
A. Well, he first began walking along with that in his arms, and the train kept getting faster and he got faster.
Q. Well, did he try to put the baby on the train?
A. Yes sir, it seemed as though——
Q. Now just describe what he did?
A. It seemed as though he was trying to put the baby on the train.
Q. How many times did you see him try to put the baby on?
A. I don't remember.
Q. Well, as the train ran faster, did he still have his hand up holding to the rod?
A. Yes sir.
Q. All the time, as you remember?

Mr. Howard: I object to that as suggestive and leading method of examination.

The Court: Go ahead and state what about it; you know what you saw, don't you?

A. I have told about it——

Mr. Howard: He says he has told about it.

Mr. Asp: No sir, he didn't say any such thing,——

The Court: Wait a minute; you gentlemen forget the ethics of the profession.

Q. How far did you see him walk or run,?
A. I should say it was 100 feet from where I saw him start.
Q. At least 100 feet?
A. Yes sir.
Q. How far did he run; how far did he get with the baby?
A. He ran to the end of the boards, along the edge of the track.
Q. Then the train was increasing all the time.
A. Yes sir.
228 Q. Did you see anybody on the platform of the car,—the day coach?
A. Yes sir.
Q. Who did you see there.
A. I don't know who it was.
Q. Was it a man or a woman?

A. I don't remember. I never noticed particularly.
Q. Did you see anybody on the steps of the smoker?
A. I think there was.
Q. Was it a man or a woman?
A. I could not tell.
Q. Did you hear anybody on the steps of the day coach say anything?
A. No sir.
Q. Did anybody on the steps of the train appear to be paying any attention to Carl Jones when he was running along there with the baby?
A. Yes, some one on the steps of the day coach, seemed as though they was trying to take it.
Q. Seemed as though they were trying to take it?
A. Yes.
Q. Well, you could not tell whether it was a man or a woman?
A. No sir, I never noticed.
Q. You could not hear what they said?
A. No.
Q. Now then when did Carl Jones stop running?
A. When he hit the truck.
Q. How do you know that he hit the truck?
A. I don't know that he did.
Q. Did you see it?
A. I could see him when he stumbled, but I don't know that he hit the truck.
Q. You were not right there?
A. No sir.
Q Could you see the truck from where you were?
A. I don't know, I never noticed it.
Q. You never noticed it but you saw him fall?
A. Yes sir.
Q. Did you hear the baby scream there?
A. Yes sir.
Q. The train was then in motion?
A. Yes sir.
Q. The train was in motion when you saw Carl Jones——

Mr. HOWARD: If the court please, we object to this leading way of examining the witness.
Sustained.

229 Q. Was the train in motion when you saw Carl Jones?
A. Yes.
Q. Was it then going faster and faster all the time?
A. Yes sir.

Mr. HOWARD: Objected to as suggestive.
Sustained.

Cross-examination.

By Mr. HOWARD:

Q. How long had you been there?
A. Do you mean working there?—been there at that time,—about five months.
Q. As night agent?
A. Yes sir.
Q. You spent the nights at the depot?
A. Yes sir.
Q. The waiting room of the depot is on which side of that bay window?
A. North.
Q. Then the passengers stayed in the north room of the depot?
A. Yes sir.
Q. How was that lighted that night?
A. Lighted by lamp light.
Q. What kind of lamp?
A. An oil lamp.
Q. Where was it?
A. It was in the south end of the waiting room on the wall.
Q. On the wall?
A. Yes sir.
Q. You are sure it was burning?
A. Yes sir.
Q. Did it have a reflector on it?
A. Yes sir.
Q. And it was inside the waiting room itself?
A. Yes sir.
Q. And it was burning at that time?
A. Yes sir.
Q. At the time of this accident?
A. I don't know that.
Q. You don't know anything about that?
A. No, I wasn't in there.
Q. You don't know whether that room was entirely dark or not at the time, do you?
A. No sir.
Q. Now then what other lights were in there?
A. That is the only lights in the waiting room.
Q. Now about the depot, what lights were there?
A. Two lights, in the office.
Q. What kind were they?
230 A. Oil lamps.
Q. Large or small?
A. They was good sized lamps.
Q. Shades or no shades?
A. No shades.
Q. On either one of them?
A. No sir.
Q. Where were they?
A. One sat up on the counter.

Q. Where was the counter?
A. Where we sold the tickets.
Q. Where did you sell the tickets?
A. Through the window.
Q. Looking north?
A. Yes sir.
Q. And the lamp sat up on that counter?
A. Yes sir.
Q. And that was near the partition between the ticket office and the waiting room, was it?
A. Yes sir.
Q. And about how far from the front of the office?
A. About ten feet.
Q. Then did you have another lamp?
A. Yes sir.
Q. What kind was it?
A. An oil lamp.
Q. The same as the other?
A. Yes.
Q. Were they both burning?
A. Yes sir.
Q. Sure about that?
A. Yes sir.
Q. They were both burning at that time?
A. Yes sir.
Q. Where was the other one?
A. Setting in the bay window.
Q. What was that for, what did you use that for?
A. So that I could see.
Q. So that you could see at your work there?
A. Yes sir.
Q. One of them was where you went to sell tickets, so that you could see at the ticket window?
A. Yes.
Q. And the other one was where you had your instrument, so that you could see at your work there?
A. Yes sir.
Q. Were there any other lights there?
A. Outside hanging on the outside.
Q. Did they have reflectors on them?
A. Yes.
Q. They were rather large lamps with reflectors were they?
A. Yes sir.
Q. And what were they for?

231 Mr. Asr: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

Overruled. Exception.

A. Why, they were to light up the platform.
Q. To light the platform; that is what they were there for, was it?
A. Yes sir.
Q. Had they been there since you had been there?

A. Yes sir.
Q. Were they still there when you left there?
A. Yes sir.
Q. How long did you stay after this accident?
A. I don't remember, about two months.
Q. About two months longer then, after this accident?
A. Yes sir.
Q. How do you know that those lamps outside the depot were for the purpose of lighting the platform?

Mr. Asp: Objected to as incompetent, irrelevant and immaterial. Sustained.

Mr. Howard: That is all.

C. R. Setford, is the next witness called to the stand by the defense, and gives the following testimony under oath:

By Mr. Asp:

Q. Where do you live Mr. Setford?
A. Cashon.
Q. What county is that in?
A. Kingfisher.
Q. How long have you lived there?
A. Four years.
Q. Were you on the night train of the A. T. & S. F. Railroad, passing through Edmond on the night of August 24, 1903?
A. Yes sir.
Q. I mean at the time that the accident is said to have occurred there, or did occur?
A. I don't know what date it was.
Q. Well, you were on that train?
A. I was on the train.
Q. Where did you get on the train?
A. At Guthrie.
Q. What was your destination?
A. Oklahoma City.
Q. What coach were you in on the train?
A. I was in the coach behind the smoker.
232 Q. Did that train stop between Guthrie and Edmond?
Q. Yes sir, it stopped at South Guthrie for a minute.
Q. Well, did it stop between the South yards in Guthrie and Edmond?
A. No sir.
Q. Did it stop at Seward or Waterloo?
A. No sir.
Q. What coach did you say you were in?
A. I was in the coach behind the smoker.
Q. That is the day coach?
A. I think so.
Q. What kind of a coach was that?
A. A long coach with an arch in the center.

Q. Do you remember how it was lighted?
A. I don't know; it was well——
Q. —Well lighted?
A. Well lighted.
Q. Were you on that coach when they pulled into Edmond?
A. Yes sir.
Q. Did you see any of the train crew in that coach as the train was approaching Edmond?
A. Yes sir.
Q. Now where was it with reference to the time the train stopped—when was it, I mean?
A. I should judge about half a mile out, maybe not quite so far.
Q. Who was it that came through?
A. I seen the conductor coming through,—going one way and the porter going the other.
Q. Now you may state what, if anything, the porter did as he went through?
A. Why, I didn't hear him say anything; I heard him call the station.
Q. Well, that is exactly what I want to know; did he call that station?
A. Yes sir.
Q. In that coach?
A. Yes sir.
Q. Before the train got into Edmond; that is before the train stopped at Edmond?
A. Before it stopped.
Q. What part of the car were you sitting in?
A. I was in the south west corner.—I was in the southwest seat.
Q. Do you know where Mrs.—Did you know Mrs. Calhoun at that time?
A. No sir.
233 Q. Well, do you remember of a woman and a little child being on that train?
A. I remember them starting to get off the train; I didn't notice them before.
Q. Did you notice where they were sitting?
A. Well, they were sitting up in the center somewhere, probably a little north of the center. Probably a little south; I didn't take any particular attention.
Q. Were they north or south of the arch in the center of the car?
A. I could not say.
Q. Do you know whether they came through beyond the arch?
A. Why, I think that they came from beyond the arch; I could not say.
Q. Now Mr. Setford, I wish you would describe in your own way just what you saw the woman do and the little boy do, if anything, from the time that the porter called the station until after the accident?
A. Well, I never knowed the lady was on the train until she got

up and started for the door, and asked if this was Edmond, and some one said "Yes" and then she went on out towards the door, and I felt kind of uneasy——

Q. —Well, did she have the boy with her at the time, as she went out of the door?

A. It appears to me as though she was leading the boy or pulling it in front of her; I could not say for sure; there was some lady with her carrying a grip behind her——

Q. Now, *do* on and describe just what you saw?

A. She went on out of the door, and then I looked out of the window, stuck my head out to see that she got off all right, and some gentlemen took the boy and I think set it down on the platform, and the train started along about then sometime, and this man ran and jumped on the train again, and she hollered for her baby, and somebody took the baby up and started to put it on the train,—

I didn't know who it was at the time,—I watched right out
234 of the window,—I was right over the gentlemen that had the baby; he tried to hand it up on the car, and said—hollered pretty loud two or three times, "Take it, take it," and he struck the truck; I think he had the baby in one hand and was holding to the railing with the other; and as near as I could see, it throwed his arm right back and throwed the baby under the car; I heard the baby cry, and jumped up and jerked the bell rope, and I made the remark to a couple of fellows along with me——

Mr. HOWARD: Never mind the remark you made.

Mr. ASP: Never mind that.

A. —Well, I ran right out of the train then.

Q. As Jones,—as the party rather, who had the baby was running alongside of the train, was the speed of the train increasing all the time?

A. Yes sir.

Mr. HOWARD: Wait a minute; We move to strike that out as suggestive.

Sustained.

Q. Well, as Mr. Jones was running alongside of the train, or the party with the baby was running alongside the train, just explain to the jury how the train was going?

A. Oh, it wasn't—when he struck the truck, he was going just about as fast as he could run I believe, very nearly; if the gentleman had the child he might have——

Mr. HOWARD: Never mind what he might have done Mr.——

Q. Could you see how far that truck was from the edge of the cars?

A. I could not when I was on the train; after I got off I should judge about four feet, four or five feet, somewhere along there.

Q. Four or five feet between the nearest part of the truck and the cars?

A. Yes sir.

Q. When the train stopped the first time Mr. Setford, state if you

know where the south end of that day coach in which you were riding set, with reference to the bay window of the depot?

235 A. Just about even.

Q. Did you notice any light in the bay window?

A. Why, I didn't then, no. I don't believe I did.

Q. I believe you testified that the car was lighted?

A. Yes sir.

Q. How long, in your judgment, Mr. Setford, did the train stop at Edmond, when it first stopped until it started.

A. From four to six minutes I should judge.

Q. And where would you say now that Mrs. Calhoun and the baby, the plaintiff, were at the time that the train started to move?

A. Why she was quite close to the door, probably out on the platform.

Q. Did any gentlemen come into the seats and pick that child up?

A. I think not; if the child was taken by a gentlemen, I didn't notice it, only after he got outside the door.

Q. Just describe how that child got off of the train and on to the platform, as you saw it?

A. Well, there was a gentlemen took it off.

Q. Where did he come from?

A. I can't say whether he came from the train or from over on the platform and somebody handed it to him, or whether he brought it off of the train himself.

Q. Well, what did he do with it then, as you remember it?

A. I think he set it down on the platform.

Q. How far from the train?

A. Oh, four or five feet.

Q. Then what did he do after he set it down?

A. He ran and jumped on the train again.

Q. Do you remember what car he jumped on?

A. I could not say; he either jumped on the south end of the car that I was on, or the north end of the smoker next to it.

Cross-examination.

By Mr. HOWARD:

Q. Where do you live?

A. Cashon.

Q. What business are you engaged in?

A. The livery business.

236 Q. Were you on your way from Cashon to Oklahoma City at that time?

A. Yes sir.

Q. Where did you buy your ticket?

A. At Guthrie.

Q. How did you get from Cashon to Guthrie?

A. I came over on the train.

Q. You bought two separate tickets did you, to make the trip from Cashon to Oklahoma City?

A. I don't remember whether I bought a round trip ticket or not.

Q. Well, do you remember whether you bought a ticket at Guthrie?
A. Yes, I bought a ticket at Guthrie.
Q. And you were coming to Oklahoma City?
A. Yes sir.
Q. Do you know whether the train was late or not?
A. A little late, about ten minutes, I think.
Q. And you were sitting in the southwest seat of that car?
A. Yes sir.
Q. And you sat there all the way from Guthrie down?
A. I was.
Q. And you saw the conductor come through the train?
A. Yes, I saw him come through a number of times.
Q. Well, before you got to Edmond, how many times did he come through, from Guthrie, to Edmond?
A. I don't know.
Q. Well, tell us about as near as you can?

Objected to. Overruled.

—. I can't tell.
Q. More than——
A. He might have come through more than twice?
Q. More than once?
A. More than once, yes.
Q. You are sure of that?
A. Yes.
Q. That between Guthrie and Edmond he came through more than once?
A. Yes sir.
Q. Well, when you saw him at any other time which way was he going?
A. The first time I saw him going through he was going north, I think.
Q. Well, where was the train at that time?
237 A. Somewheres out of Guthrie.
Q. And the next time you saw him which way was he going?
A. He was going,—oh, I don't know which way he was going.
Q. And the next time you remember him which way was he going?
A. South, I believe.
Q. Where was the train then?
A. Pretty close to Edmond.
Q. Where was the porter at that time?
A. I don't know.
Q. Did you see the porter at that time?
A. Seen him right afterwards a little while.
Q. How long afterwards?
A. About a minute, I expect.
Q. Now, in estimating that minute, you estimate it about the same that you do the time you say the train stopped at Edmond, do you?

You think it was about one sixth as long after you saw the conductor until you saw the porter, as the time that the train stopped at Edmond, do you?

A. No, I would not think it was that long hardly.

Q. Well, how long do you think it was?

A. Why, I don't know, somewheres near,—it might have been a minute and it might have been longer, and it might not have been that long.

Q. And it is the same way about the stop at Edmond, is it not?

A. Yes sir.

Q. As a matter of fact the conductor and the porter met right there at the south door of the car, and you sat right in the southwest seat, is not that true?

A. Well, I had my back to the south; I don't know where they met at.

Q. Well, you know that you saw them almost at the same time, don't you?

A. Pretty near, yes sir.

Q. And the one was barely gone until the other appeared; that is a fact is it not?

A. That is a fact, yes sir.

238 Q. And the conductor was closer to that porter than you were when the porter appeared in your sight was he not?

A. —what?

Q. As a matter of fact the conductor was closer to the porter than you were when you first saw the porter, wasn't he?

A. I don't know.

Q. You don't know that?

A. No sir.

Q. What kind of a man was the porter?

A. He was a colored man.

Q. Did you ever see him before?

A. I don't know as I ever did.

Q. Have you ever seen him since?

A. I don't know as I ever did.

Q. How did you know he was the porter?

A. I saw the sign on his hat.

Q. You looked at that, did you?

A. Yes sir.

Q. Did you have any reason for knowing that that was the porter, or for wanting to know,—did you want to speak to him about anything?

A. I wanted to know what station it was.

Q. You did not know yourself what station it was?

A. Well, I had a reason for wanting to know whether it stopped at Seward or not.

Q. And so you wanted to know what station this was and the porter told you, did he?

A. No, I didn't ask him.

Q. You heard him mention the name, did you?

A. I heard him mention the name.
Q. Where was he when he mentioned it?
A. He was right at the door.
Q. About how long was that car?
A. Why, I don't know, fifty or sixty feet.
Q. Nearly double as long as an ordinary car?
A. No, it wasn't double.
Q. And you heard the name of the station mentioned by the porter there in the door when he came in?
A. Yes sir.
Q. And that is how you happened to know it was Edmond.
A. Yes.
Q. Now I believe you said that you don't really know how that little boy got off the train,—this plaintiff?
239 A. I do not.
Q. Do you know how he got out of the car?
A. I know how he was handed off of the train to a man.
Q. That is exactly what I mean,—do you know how he got out of the car?
A. No, I don't know how he got out.
Q. You don't know whether the gentlemen went down to the seat where the little boy was and carried him and handed him off to someone, or whether his mother led him out?
A. No, I think she was leading the little boy, kind of pushing him ahead of her as she went out.
Q. You don't remember that as a distinct fact?
A. Oh no.
Q. Now as to the time that the train stopped there, you have no distinct recollection of that, have you?
A. Yes sir.
Q. Why?
A. Why, I was in a hurry to get down to Oklahoma City——
Q. And you felt impatient of the time and it seemed long, isn't that a fact?
A. I expect that is it.
Q. You expect that is the fact of it, that is all.

Redirect examination.

By Mr. Asp:

Q. Well, you do have a recollection that as Mrs. Calhoun and the baby left the car, that she was either leading or he was going along ahead of her; do you not?
A. I could not tell; I remember seeing the baby, and I think that she had possession of the baby when she went by me.
Q. She was either leading it or pushing it along ahead of her?
A. Well—I think they—were.
Mr. Howard: You remember it that way, you mean?
A. Well, I remember it that way.
240 Q. You remember it that way?
A. Yes sir.

Q. And do you or not remember that it was not picked up on the seat by the gentleman and carried out ahead or behind her?

A. I didn't notice it being picked up inside the car at all.

Q. You just saw it going into the possession of a man, or when it was handed off from the coach to a gentleman on the platform?

A. Yes, a gentleman held it on the platform, and I don't know whether it was handed off to him or whether he got off the train with it.

Mr. Asp: That is all.

Recross-examination.

By Mr. Howard:

Q. Did you notice where the porter went after he came into this car?

A. He went on through it.

Q. He went on down through it?

A. Yes sir.

Q. Did you see him come back?

A. No I did not.

Q. Never saw him come back; are you sure that he went on down through it?

A. He went on north,—I don't know——

Q. Do you know how far he went?

A. No sir.

Q. Or when he came back?

A. No sir.

Q. You were right or almost at the place where people got on and off of the car?

A. Yes,—that is in the corner seat.

Q. Was the porter there helping people off and on?

Objected to as incompetent, irrelevant and immaterial. Sustained. Plaintiff excepts.

Q. Did you see the porter there at the head of the car?

A. Yes.

Q. What was he doing?

A. When was that?

Q. After the train stopped?

A. No, I didn't see him,—you mean down on the platform,—No, I didn't see him.

Q. Did you see any of the train men down there?

Mr. Asp: Objected to as improper cross examination.

Mr. Howard: All right, that is all.

241 Mr. Asp: As the porter went through the train, did you hear him at that time call the station again in another part of the car?

A. Why, no——

Mr. Asp: Was he inside the car when he called it?

A. Yes sir.

Q. He was inside the car when he called it?
A. Yes.
Q. And he was in the car south of the archway?
A. Yes.
Mr. HOWARD: And you were the closest person to him?
A. Well, I don't know; some were south right across the aisle.
Mr. HOWARD: Well, you were on the seat as near as any other in the car to him?
A. Yes sir.
That is all.

E. K. BRYANT is the next witness called to the stand by the defendant, and gives the following testimony under oath:

By Mr. ASP:

Q. Where do you live?
A. Cashon, Oklahoma, Kingfisher Co.
Q. How long have you lived there?
A. About four years.
Q. Were you a passenger on Santa Fe train No. 405, the night of August 24th, 1903, or the train upon which this accident is said to have occurred?
A. Yes sir.
Q. You were on that train?
A. Yes sir.
Q. Where did you board that train?
A. At Guthrie.
Q. What was your destination?
A. Oklahoma City.
Q. Who was with you?
A. Well, my brother, and Mrs. Setford.
Q. Do you remember when that train left South Guthrie that night?
A. No sir, I don't know the time.
Q. You remember the fact?
A. Yes sir.
Q. Did that train, after it left South Guthrie, stop at any station until it reached Edmond?
A. No sir.
Q. Where were you in the car?
A. Well, I was on the south end,—th. first seat on the south end of the car, in the east side,—or the south east part of the car.
Q. Did you see Mrs. Calhoun and the little child in that car?
242 A. Well, not prior to the time that she went to get off, I didn't see her.
Q. It was one of these long cars, was it?
A. Yes sir.
Q. Was there an arch-way in the center?
A. I think there was.

Q. When she got up to get off, did she get up from the seats south of that arch-way?
A. I don't know.
Q. You don't know?
A. No sir.
Q. Did you see the train porter about the time the train was pulling into Edmond?
A. Yes sir.
Q. Did you hear him call the station at Edmond?
A. I did.
Q. Where was he when he called the station?
A. Well, he was near the end of the car I was in.
Q. Was he on the inside of the car?
A. Yes sir.
Q. That is, inside of the part of the car where the seats were?
A. Yes sir.
Q. Where did he go after he called the train?
A. He passed through, and I didn't notice after.
Q. Did you notice whether he called the station at the other end of the car?
A. No sir, I didn't.
Q. Did you see Mrs. Calhoun and this little boy get off?
A. Well, I seen them come up by me where I was sitting.
Q. Who was with them, if any one at that time?
A. Well, I think there was a lady and a little boy with them.
Q. A lady and a little boy with her.
A. Yes sir.
Q. Well, the little boy is the plaintiff in this case?
A. Yes.
Q. How was the little boy getting to the door?
A. I think, if I remember right, his mother was leading him.
Q. How were they going to the door, as to being in a hurry or not?
A. Well, they didn't seem to be in any particular hurry.
Q. Did you notice them having any grips?
A. No sir, I could not say as to that.
243 Q. Did you notice whether the lady with them had any grips or not?
A. No sir.
Q. Well, did you notice where they were at the time the train started?
A. Well, they was out of my sight; I was sitting kind of leaning agen- the side of the car, and I could not see very well outside of the door.
Q. Well, where were they, in your best judgment, now, about the time the train started?
A. Well, I should judge they were on the platform.
Q. Did you see any gentleman come in and pick up that child and carry it out?
A. No sir.
Q. They went right on past you?
A. Yes sir.

You were on the south side of the south end of the day coach?
A. Yes sir.
Q. Did you see the baby taken off from the train?
A. No sir, I didn't see that.
Q. In your judgment, how long had that train stopped before the accident?
A. I think about five minutes.
Q. And you don't know *whether* the mother of the plaintiff and the plaintiff were until you saw them starting to go out?
A. No sir.
Q. You don't know whether they were in *the* that car or not?
A. No sir, I could not swear to it.
Q. Did I ask you whether the train stopped between Guthrie and Edmond?
A. Yes sir.
Q. You say they did or did not?
A. They did not.

Mr. Asp: I believe you may take the witness.

(No cross-examination.)

J. T. Riley (Dr.) is the next witness called to the stand and gives the following testimony under oath, on behalf of the defense.

By Mr. Asp:

Q. Where do you live Doctor?
A. Oklahoma City.
Q. How long have you lived in Oklahoma City?
244 A. I came here in 1894, was here two years, and then I was at South McAlester five, and I have been here ever since.
Q. Were you a passenger on the night train of the A. T. & S. F. R. R. Co., between Guthrie and Oklahoma City on the night of August 24th, 1903, or rather the night on which the accident is said to have occurred at Edmond?
A. Yes sir.
Q. You were on the again that night?
A. Yes sir.
Q. Where did you get on the train that night?
A. At Guthrie.
Q. What was your destination?
A. Oklahoma City.
Q. Do you remember whether the train stopped between Guthrie and Edmond?
A. It did not.
Q. Do you remember of the train stopping at Edmond?
A. I do.
Q. Did you hear that station called?
A. I did.
Q. Do you remember who called it?
A. The porter.
Q. The train porter?
A. Yes sir.

Q. Where were you in the train?

A. I was sitting behind,—that is, north of the division of the arch, in that double seat.

Q. Did you see Mrs. Calhoun and the little boy, the plaintiff in this suit?

A. I saw a lady and a little boy.

Q. Did you see them get off?

A. No sir, I saw them start to the train—to the end of the car.

Q. How long was it after the train stopped before they started, as you remember?

A. Well, I think the train was there two or three minutes, or it might have been four, for all I know; but it stopped the usual time.

Q. And where was the plaintiff and the little boy, or Mrs. Calhoun or the lady and the little boy, at the time the train started; as you now remember?

A. They were in the aisle, they were sitting on the right hand side of the coach, that is, the west side of the coach, in front of
245 *of* the division; they were sitting on the same side of the car that I was sitting, and just as soon the *the* train was starting, she wakened up to the fact, and asked the question if this was Edmond, and someone said "Yes," and she wanted to get off, and the little boy was running ahead of her to the end of the car, and then I——

Q. —could not see them any more?

A. —I put my head out of the window to see what the result would be, for I was fearful that there would be trouble in getting off——

Mr. HOWARD: Never mind what you were fearful about. State to the jury what you saw.

A. I saw some person take the child off, and then the train was going too fast for her to get off, and she said, give her her child, or "give me the child," and a man undertook,—somebody,—I don't know who it was,—to hand her the child——

Q. Well, did you notice where the man came from that took the child off from the train, and what he did with the child?

A. I don't know where he came from, but he placed it down and I think intended to help the lady off, but the train was going too fast for her to get off, and she spoke for her child, and a man grabbed it—grabbed up the child and tried to give it to her, but he ran against a truck, and the child fell from his arms and fell under the car.

Q. Could you tell how far that truck was from the train?

A. Why, I think that truck was pretty close to the train; I don't think it had been moved after it had been loaded,—from the express car.

Q. Or from the baggage car?

A. Or from the baggage car.

Q. The train stopped——

A. —At Edmond?

Q. At Edmond, you say two or three or possibly four minutes?

A. Yes sir.

Q. About how far in your judgment had the train run when this young man ran against the trucks?

246 A. Oh, not very far, possibly 50 or 60 feet; it might have been more.

Q. It might have been more?

A. It might have been more; I am not sure as to that.

Mr. Asp: Where was the porter at the time he called the station?

A. The porter called the station at the front end of the car, and then came back past the center, and called the station again, and then turned and went out at the front end of the car.

Mr. Asp: That is all.

Cross-examination.

By Mr. Howard:

Q. Doctor, were you subpœnaed here?

A. When?

Q. At any time?

A. Yes sir.

Q. When?

A. This morning.

Q. What time this morning?

A. Just awhile ago, as soon as I came into the court room.

Q. How did you happen to come here this morning?

A. I was subpœnaed here in the Allen case.

Q. And you learned that this case was going on?

A. I saw that it was.

Q. And you saw the attorneys and advised them that you had some information for them?

A. Well, if this is cross examination, I will answer it but——

The Court: Answer the question.

Mr. Asp: Objected to as not proper cross examination.

Overruled. Exception.

Q. That is a fact, isn't it. How about that——

The Court: Tell him how you happened to testify.

A. Yes sir. I asked what case this was and I remembered it at once, and I spoke to Judge,—there——

Q. Mr. Chambers?

A. Mr. Chambers, yes sir; but I didn't know whether I would be of any use or not, but I simply knew something about it.

247 Q. And then you went to Mr. Asp?

A. No, I didn't go to him.

Q. Had information conveyed to them that you had information that they might wish?

A. No, I didn't say "information."

Q. Well, what did you say?

A. Judge, if this is——

The COURT: Go ahead and tell him.

Q. I will make it plain to you, Doctor; you saw an opportunity to testify in this case, didn't you?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial and argumentative?

Overruled. Exception.

Q. That is a fact, isn't it.

The COURT: Just state Doctor, how you happened to testify?

A. I came in here in the Allen case, and as you know, I tried to get excused from that case, as I wanted to go east, and I didn't know anything about this case coming up here, and I discovered that it was up, and I said to Dr. Day: "I was on the train that night and saw that accident," and he said, "If you——"

Mr. HOWARD: Never mind stating your conversation with Dr. Day; state what you did with reference to the attorneys and the parties.

A. Well, I have told you that I spoke to——

Q. —Yes.

A. And then I spoke to this man when I came to get a drink; I said I was on that train.

Q. Well, you spoke to Mr. Asp, didn't you; you first spoke to Mr. Chambers, and then to Mr. Asp, didn't you?

A. No, I called Mr. Chambers over to me.

A. And then you spoke to Mr. Asp, didn't you. (No answer.)

Q. Doctor, you saw the condition of the woman and child that night did you, and that they were going to undertake to get off?

A. I thought they were.

Q. How far were you from them?

A. Half the length of the car.

248 Q. Did you offer any assistance or suggestion yourself?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial, not proper cross examination.

Sustained.

Q. Which direction were you from them?

A. The same direction that the train came from

Q. North of them, were you?

A. Of who?

Q. Of Mrs. Calhoun and the child.

A. Yes sir.

Q. About how far north?

A. On the seat where I was sitting.

Q. Where were they sitting?

A. They were sitting in front I think.

Q. About how far?

A. Oh, two or three seats from the combination car.

Q. And how far behind them were you?

A. I was just the next seat behind the combination.

Q. Then they were only three or four seats from you?

A. Yes sir.
Q. Then that would not be half the car would it?

Mr. Asp: Objected to as argumentative.

Q. Were they in plain view of you?
A. They were.
Q. And you heard the porter call the station at the front part of the car?
A. I did.
Q. Where was he from you when he called it the second time?
A. He was right then near my left.
Q. Was he north of south of you?
A. He was east of me.
Q. East of you and right by you?
A. Yes sir, right near the back of the seat.
Q. You are sure you heard him while he was at the front?
A. I did.
Q. And you heard him while he was standing there by you?
A. I did.
Q. Did he stop somewhere there?
A. He did; he stopped long enough to turn around and go back.
Q. He didn't go on into another car?
A. No sir.
Q. He turned and went the other way?
A. Yes.

Q. Did he do that hurriedly or slowly.?
249 A. I think in the usual way.
Q. Where did you come from?
A. Guthrie.
Q. Did you buy a ticket at Guthrie?
A. Yes sir.
Q. You paid your transportation that night?
A. I usually do.
Q. The fact of the business is that the railroad extends you favors all the time, does it not, in the way of transportation?

Objected to as incompetent, irrelevant and immaterial. Overruled. Exception.

A. No sir, they don't always.
Q. They do as a rule, don't they?
A. No sir, I carry—and sometimes, I have them and sometimes I haven't, and they are in book form now, and sometimes I run out of a book, and I could not get an application for four or five weeks——
Q. Where did you come from that night?

The Court: He has answered that.
Objected to. Sustained.

Q. Didn't you come from (?) Mill Hill instead of Guthrie that night?
A. No sir, I came from (?) Mill Hill in the afternoon.
Q. And then came from Guthrie that night?

A. Yes, I told Mr. Bruce that I thought that I had come from Mill Hill, but I came in the afternoon.

R. A. BRYANT is the next witness called to the stand by the defense, and gives the following testimony under oath:

By Mr. ASP:

Q. Where do you live Mr. Bryant?
A. Cashon, Oklahoma.
Q. How long have you lived there?
A. A little over 4 years.
Q. Were you a passenger on the Santa Fe train No. 105, on the night of August 24th, 1903, or the time that the accident is alleged to have occurred at Edmond?
A. Yes sir, I believe I was.
Q. You were on the train that night?
A. Yes sir.
Q. Where did you get on the train?
250 A. Why we came from Cashon over to Guthrie on that short line, and then we went from Guthrie on to Oklahoma City.
Q. Oklahoma City was your destination?
A. Yes sir, we got on the main line at Guthrie, on the Santa Fe.
Q. Do you know whether the train stopped at Edmond that night?
A. Yes sir.
Q. Did the train stop between Guthrie and Edmond?
A. No sir, we didn't stop between Guthrie and Edmond.
Q. Didn't stop at Seward?
A. No sir.
Q. Or Waterloo?
A. No sir.
Q. Did you see Mrs. Calhoun and the plaintiff, the little boy, on the train that night?
A. No, not to know them.
Q. Did you see a lady and a little boy on the train,—did you see them on the train?
A. Not until the train stopped.
Q. Not until after the train stopped?
A. No sir.
Q. Well, in your best judgment Mr. Bryant, how long did the train stop at Edmond?
A. Why, it seemed to me that it was at least five minutes, anyway.
Q. Did you see the train porter on the train that night?
A. Yes sir.
Q. Was the train's arrival at Edmond announced that night, or called,—was the name *of* the station called?
A. Yes sir.
Q. Who called it?
A. Why, the porter came through and called the station.

Q. Where was he when he called the station?

A. Well, when I heard him call the station, he came through the car that I was in, and called it; first he came into the south end of the car, and went on back——

Q. Did he call it inside the car where the seats were?

A. Yes.

Q. Did you hear him call it again?

251 A. Yes, he called it in the rear end of the car some place, I didn't look around.

Q. But you heard it?

A. Yes sir.

Q. Now did you see the woman and the little boy start to get off?

A. There was a lady and a small boy came along about where I was sitting,—I was sitting in the—I think near the end,—near the end seat.

Q. At what end of the car?

A. The south end of the car facing the south, and I noticed the lady and the little boy come back by where I was sitting.

Q. Was there anybody with them?

A. There was another lady with them, I think.

Q. Was there a gentleman with her at the time, carrying the child?

A. No sir, I didn't see any.

Q. Do you know whether or not at that time she was leading the child or whether the child was going ahead of her?

A. I think she was leading the little boy or child, whatever it was.

Q. Well, where were they when the train started?

A. Well, I think the train had started then; I think the train was in motion when they came down by where I was,—or started about that time.

Q. Did you hear the lady say anything?

A. No, not to my recollection.

Q. Did you hear any lady say anything coming from the car or on the platform of the car?

A. No.

Q. You didn't see either of them get off?

A. No sir.

Q. You did not see the baby handed off?

A. No sir.

Q. You didn't hear her or any other lady say anything out on the porch or out on the steps of the car?

A. Well, after the child had been put off it created somewhat of a commotion, and there was some talk there.

Q. What did you hear?

252 A. I heard someone say "Give me back my child" *of* "boy" or something like that.

Q. That was somebody who was out on the platform.

(No answer.)

Mr. Asp: That is all.

Cross-examination.

By Mr. HOWARD:

Q. Do you know whether they said "Give me back my child," or "Give back the boy," what was it?
A. Something to that effect.
Q. Somebody out there on the platform?
A. Yes, on the platform.
Q. Do you know whether they said "Give it back," or "take it back?"
A. I think they said "Give it back."
Q. Was it a man's voice or a woman's voice?
A. I could not tell.
Q. You don't know whether it was a woman asking for the child or somebody on the platform suggesting that the child be given to her, do you?
A. No sir, I don't.
Q. How close were you?
A. I was sitting in the south end of the car; I think the end seat.
Q. You were a good deal closer to the platform than one would have been in the middle of the car, were you not?
A. I suppose so.
Q. Your hearing is good?
A. Yes sir.

Mr. HOWARD: That is all.
Mr. ASP: I want to read the deposition of W. W. Robertson.

Whereupon said counsel reads said depo-tion, as follows:—

TERRITORY OF OKLAHOMA, *County of Oklahoma, ss:*

In the District Court.

SAMUEL CALHOUN, Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RY. CO., Defendant.

Deposition for the Plaintiff.

253 The deposition of W. W. ROBERTSON taken on notice at office of Sam Hooker at Oklahoma City on Nov. 18th, 1904, to be used as evidence for the plaintiff in this case.

The witness being duly sworn before deposing testified as follows:

Q. State your age, residence and occupation?
A. Age 48, residence, Edmond, Okla. occupation Agent for Maynard, Merrill & Co.
Q. Were you present at Edmond, Okla., on the night that Samuel Calhoun received an injury by which his foot — injured in a railroad accident?
A. I was present at the time the child received an injury.

Q. Do you remember the surname of the child?
A. I do not.
Q. Have you since ascertained the name of the child who received an injury that night?
A. I have heard it was Mrs. Calhoun's child.
Q. Where did you take the train that night?
A. At Guthrie.
Q. To what point were you going that night?
A. To Oklahoma City.
Q. En route from Guthrie to Oklahoma City, did you see the child or its mother on the train?
A. I saw the child and the person who I supposed to be its mother on the platform of the train.
Q. What were they doing when you saw them?
A. Mother was standing on the platform holding the child on first step coming down from the platform and asked if some gentleman would not take the child off.
Q. Where were you standing or sitting when the train pulled into Edmond?
A. I was standing on the outer platform on the steps going down from the platform ready to jump off as soon as the train checked up.
Q. Did you do this?
A. I did.
254 Q. Whom did you meet if any one when you got off the train?
A. I met my son who had a package and also my mail for me and whom I was expecting to meet there.
Q. Did you get off the car and go on to the depot platform that night?
A. I did.
Q. How long did you remain on the platform?
A. I cannot answer that question definitely as to time; I passed a few words with my son, received my mail from him, told him goodbye, and started back to the train.
Q. Was the train starting as you started back towards it?
A. It was moving at that time slowly.
Q. Before you got to Edmond, did you hear any of the employés of the railway announce the station?
A. Sometime before reaching Edmond, I got up from my seat and went forward to the platform; I did not hear anyone announce the station, but it might have been announced as I was not in a position to hear it.
Q. On the approach of the train to Edmond, if I understand you, you were on the platform of the coach, and not in it?
A. I was; just as it neared the depot, I went down on the steps.
Q. With reference to the platform upon which you were standing, where was the smoker to that car?
A. The next coach ahead of us, is my recollection of the matter.
Q. While the train was standing at Edmond, what conversation,

if any, did you hear between the conductor and the porter as to the station having been announced?

Defendant objects (in the depo.) as incompetent, irrelevant and immaterial, as not tending to prove any issue in this case, etc. Objection waived by Mr. Asp.

A. During the first stop of the train I heard no conversation between the conductor and porter, after the accident had taken place I then heard the conductor ask the question and heard
255 the porter answer the same.

Q. State fully the conversation and also the length of time between the time of the accident and the time of this conversation?

To which defendant objects (in the depo.) for the same reason as to the past preceding question and for the further reason that the knowledge of witness is not shown and the proper foundation for such question not having been laid.

Mr. Asp: I press my objection to that; is it sustained. It is a conversation between the conductor and the porter——

The Court: Subsequent to the accident?

Mr. Asp: Yes.

The Court: That is not competent.

Q. When the lady and child were on the platform of the car, what were they trying to do?

A. From her remarks, "Will not some gentleman help take the child off," I suppose her intention was to get off the train.

Q. To whom was the child handed, if any one, and by whom?

A. The child was handed to me by the lady who I supposed to be its mother.

Q. What did you do with it?

A. I took the child off, ran back and handed the child to my son, and told him to hold the child.

Q. Was the train moving at that time?

A. It was.

Q. How long did the train remain at Edmond, that night on its first stop?

Objected to by defendant in the deposition, and said objection is withdrawn by Mr. Asp, for defendant, in this trial.

A. I cannot say exactly how long train stood at the depot.

Q. At the time that you took the boy from the woman on the platform, state whether or not conductor or porter either were around that part of the car?

Objected to by defendant in deposition, and said objection is withdrawn by Mr. Asp; for the defendant on this trial.

256 A. At the time I took the child from the train, I saw neither porter nor conductor.

Q. How long after you took the child from its mother and handed it to your son was it before you saw the child on the truck injured?

A. I cannot answer that question as to time with any degree of exactness.

Q. Give your best judgment as to time between these events?

A. To do so would be a guess and only a guess.

Cross-examination.

Q. Mr. Robertson, when you first saw the mother and child on the platform of the car, state whether or not train was at that time in motion?

A. It was.

Q. On which platform of which car was it when you saw those two.

A. My recollection is it was on the front platform of the coach just in the rear of the smoker.

Q. Do you know whether the smoker was the first car from the engine which carried passengers on that train?

A. I do not.

Q. At the time the train came to a stop at Edmond the first time, do you know about where the engine stopped and about where the baggage car was relative to the station building at Edmond?

A. My impression is that the engine was at that time at the tank taking water from same, but I cannot answer definitely.

Q. Do you know whether or not — baggage car was the first car behind the engine?

A. I don't guess I paid any attention to the location of the baggage car, that night.

Q. Mr. Robertson, from the time the train approached Edmond on this night, please state in your own way all the facts connected with this accident up to and including a time when the train stopped for a second time after the accident occurred?

A. I was on the train on which the lady and child came to Edmond, but desiring to go on through and expecting to meet my son on the station platform, I went out on the coach platform be-
257 fore we stopped at the station; I don't know whether anyone called the station in the car. I got off when the train stopped or rather just as the train was stopping and after getting a package and mail from my son, went back to the end of the coach. As I got to the steps, the lady was standing at the top of the coach platform; the train was moving out at that time, the lady said: "Won't some one please take the child off?" I took the child off, handed it to my son and told him to hold it. When I had handed the child to my son, I ran back to the steps and learned the lady wished to get off also; I told her she could not do so as the train was running too fast; she was down on the steps; I heard someone behind me and looking back saw a man trying to put the child on the steps. I told him Get back! get back! knowing it was too dangerous to try and put the child on. Just at this moment he struck a truck and I saw him reel and the child seemed to slip from his grasp. I then lost sight of him until the train made the second stop; I was where the trucks stood after the train stopped. I cannot say how long the train stood at the depot, was not in a position to hear Mrs. Calhoun say any-

thing to anyone about putting the child back on the train. Believe it was the head end of the coach next to the smoker where the lady came out and the child was lifted off.

Q. Where were you standing on the depot platform or on the rear step of the smoker when you first warned the lady, Mrs. Calhoun, to not attempt to get off the train?

A. I was on the depot platform, and was starting to get on the steps where she was.

Q. How did you warn her and in what way?

A. After handing the child to my son, I returned to the steps and found her coming down the steps; I told her to not attempt to jump off, that the train was running too rapidly.

258 Q. This was, as I understand you, directly after you had taken the baby from the mother, placed it in charge of your son, and returned running to the car?

A. It was.

Q. Did you at any time subsequently give additional warning to Mrs. Calhoun to not jump off?

A. I did not.

Q. When you warned her, did she desist from the attempt to dismount from the train?

A. I cannot say, as I hurried past her and climbed up the rear steps of the coach in front.

Q. You do know however that she made no further attempt to get off the train?

A. Do not know whether she made any other attempt to get off, but am satisfied she did not get off until the train made the second stop.

Q. At the time you mounted the rear steps of the smoker, the train was moving quite rapidly was it not?

A. It was.

Q. Too fast for a lady to mount or dismount?

A. Yes sir.

Q. You did not hear Mrs. Calhoun ask anyone to put her baby back on the train, did you?

A. I did not.

Q. When was it you next saw the baby directly after this?

A. As I was climbing or going up the rear steps of the next coach my attention was in some way attracted and as I turned I saw the baggage man with the child trying to put the child back on the train; I hollooed to him, "Get back, get back," that the train was running too rapidly. Just about that time I saw him run against the truck and when he did so, it seemed to make him reel and to lose his hold of the child. I saw the child slip from him and I thought both of them fell under the train.

Q. Did you have an opportunity to and did you observe how near the coach the baggage check man ran with the child?

259 A. Yes.

Q. Please describe in your own way?

A. He made several attempts to hand the child on, each time coming as nearly as possible in front of the steps, and then going

out in a curve from the train and comming back in front of the steps.

Q. How many such attempts, if you know, did the check man make to put the child on before he ran into the truck?

A. I cannot answer definitely; two or three times, I think.

Q. Was the check man running fast or slow, state approximately.

A. He was running as rapidly as circumstances would permit.

Q. As I understand you, the train at this time was running pretty fast and the check man until he struck the truck, managed to keep up with the train, did he not?

A. The speed of the train had materially increased. When he struck the truck he was slightly back of the platform but was at that time making an earnest effort to catch up with the platform in order that he might make another effort to hand the child on. Just before he struck the truck he had made an unsuccessful effort to put the child on and had falled behind the platform; then it became necessary to make another run to catch the platform and before reaching the platform he struck the truck.

Q. Is it not true this check man was running as fast as a man could, situated as he was on this occasion?

A. He was doing his best to put the child on but I cannot answer as to his speed.

Q. Is it not true, that the attention of the check man was solely directed to placing this child on the car platform?

A. I think that was the case; at the same time, curves made by him shows he was aiming to be thoughtful as to his surroundings.

Q. Could you see where his eyes were directed?

A. I could not; his attention was naturally directed to the platform.

Q. You say he had just made one of these curves from the train when he struck the truck?

260 A. He was making a curve coming to the train when he struck the truck.

Q. You saw him strike the truck?

A. I did.

Q. What part of the truck did he strike?

A. He struck one corner.

Q. How was the truck standing, lengthwise, parallel with the truck or not at the time the check man struck it?

A. I cannot answer definitely; my recollection is that the corner of the truck which he struck was nearer the train then the far end of the truck from him.

Q. Do you remember where this truck was located with reference to the platform of the depot at Edmond?

A. I think the truck was near the end of the board platform.

Q. Are you able to approximate the distance from the center of the depot building, or where the bay window of the depot is, to where the truck was located at the time of the accident?

A. I cannot give answer.

Q. Did you say the truck was at the end of the board platform and where was it located with reference to this platform, having

reference to an easterly or westerly direction? Was it on the board platform or was it on the cinder part of the platform?

A. I cannot answer this question definitely; my impression was that the truck was on the board platform but near the end of it. I think it was on the board platform, but cannot speak definitely.

Q. It might, so far as you know, *not* have been outside and west of the board platform and resting on the cinder platform, might it not?

A. I think not, my impression is that the part of the truck he struck was on the platform.

Q. At the time of the accident did you know who it was that was running with the child?

A. I think I did, and am under the impression that I recognized his cap, but I paid no attention to who it was at the time.

261 Q. Did you recognize the child held by the man running to be the same child which you had lifted from the train just previously?

A. I could not recognize the child but *circumstances* connected with the attempt to put the child back on the train after I had left the child on the platform convinced me at once it was the same child.

Q. When the train first came to a stop at Edmond, state if you know where with reference to the bay window of the depot platform, were the mother and child standing?

A. Either opposite or slightly south; I am inclined to think south of it.

Q. Who were about the platform at that time, other than those you have mentioned, viz: your son, the mother and child. Please give the names of all you remember having seen about that time.

A. As I jumped off the train, Superintendent Vaught of Oklahoma City climbed on; there were more than the usual number of people about the platform that night. I don't recall, however, that I spoke to anyone except my son.

Q. Did you see Mr. Rodkey about that time?

A. I saw a gentlemen standing by my son at the time I handed the child to my son; I afterwards learned it was Mr. Rodkey, but did not recognize him then.

Q. Were there any others in the crowd at that time whom you recognized or with whom you were acquainted?

A. I might have gotten acquainted with several parties there that night, but I paid no attention to them, and cannot state definitely who were present.

Q. Your attention was chiefly taken up with looking out for your son was it not?

A. It was.

Q. When the train rolled into Edmond where was your son standing relative to the bay window of the depot?

262 A. He was standing north of the bay window and, I think, almost in front of the door to the waiting room; he was possibly a little north of the front.

Q. When you first came into Edmond, you readily discovered where he was standing?

A. I saw him just before I jumped from the train as I had gone down *of* the lower step to get off.

Q. I will ask you if the lights in the bay window were not shining out on the platform that night?

A. Light was shining from the bay window.

Q. As I understand, one side of the bay window faces toward the south; is this true?

A. It is.

Q. I will ask you if it is not true that the cars were also casting light out on the platform?

A. The car out of which I came was lighted and the light from that car was shining on the platform where I was standing.

Q. You don't intend to convey that the other cars of the train were not lighted?

A. I don't know but simply did not notice.

Q. Did you see the truck by the light shining from the cars?

A. I did.

Q. You were not paying particular attention as to the official position of the man who held the child and who was trying to put it on the train, were you?

A. I was not.

Q. Had you been called on then to designate the party, could you have done it?

A. I don't think I could.

Q. You mean you could not state his official position?

A. That is exactly what I mean.

Q. When you got off the car as it approached Edmond, was there anyone — or about the steps of the car?

A. I cannot answer this question; I am inclined to think others were on the platform, but I don't know certainly. I had gone
263 down on the lower step and was watching for my son and jumped from the train to go to him as soon as I saw him.

TERRITORY OF OKLAHOMA, *County of Oklahoma, ss:*

Before me, W .H. Zwick, on November 18th, 1904, the deposition of W. W. Robertson was taken in this case and I hereby certify that the foregoing is a true and correct deposition of said Robertson taken upon the notice hereto attached at the time, place and for the purpose stated therein. That said deposition, by agreement of parties, was written by T. R. Jones *and* stenographic notes and afterwards transcribed by him on the typewriter and read by the witness and subscribed by said witness in my presence. That I am not related to either of the parties hereto nor an attorney interested therein, nor have I any interest whatever in this lawsuit; that by agreement of parties this deposition is to be read as evidence in the case of Anna Calhoun against said defendant, now pending in this court; that said witness was duly sworn before deposing.

[SEAL.] WILLIAM H. ZWICK,
Notary Public.

My commission expires Dec. 11, 1906.

11-28-04. Signature of witness to the within deposition is hereby waived by the parties hereto.

GEO. W. GREEN,
Att'y — Def't.
SAM HOOKER,
Att'y for Pl'ff.

264 SAMUEL CALHOUN, Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, Defendant.

Notice to Take Depositions.

The defendant is notified that the plaintiff will on Nov. 18th, 1904, at the law office of Sam Hooker in the City of Oklahoma City, O. T., at one o'clock P. M., proceed to take the depositions of divers parties to be used as evidence for the plaintiff in this cause; that said taking will continue from day to day until completed.

SAMUEL CALHOUN,
By SAM HOOKER, *Att'y.*

Service of this notice is hereby accepted this the 16th day of Nov., 1904.

W. F. WILSON,
Per H. E. ELDER.

Published at request of Chambers, Taylor and Hooker.
Filed in District Court, Oklahoma County, O. T. Nov. 28th, 1904.
B. D. SHEAR, *Clerk,*
By WILL H. CLARK, *Deputy.*

WALTER MELVILLE ROBERTSON is the next witness called to the stand and gives the following testimony under oath on behalf of the defense:

By Mr. ASP:

Q. Where do you live, Walter?
A. Edmond, Oklahoma.
Q. Do you remember the occasion of this accident?
A. Yes sir.
Q. Where were you that night?
A. I was at the depot at Edmond.
Q. What was the occasion of your going to the depot?
A. My father was coming through on the night train and I was down there to meet him.
265 Q. Did you meet him?
A. Yes sir.
Q. Did you see him get off the car?
A. I don't recollect seeing him.
Q. You don't recollect seeing him get off the car.
A. No sir.

Q. But he did get off?
A. Yes sir.
Q. And you did see him?
A. Yes sir.
Q. Do you remember seeing Mrs. Calhoun and the little boy, the plaintiff in this case?
A. When do you mean?
Q. That night?
A. Why yes, I saw her afterwards.
Q. Now when did you first see the little boy?
A. When my father handed the child to me.
Q. Now just explain how your father got that child and how he handed it to you?
A. Well, just as the train was leaving the station the lady and the little child came on the platform, and I think she said, "Will some gentlemen please help the child off;" and my father was just getting on the platform and he took the child, and he handed it down on the platform to me; and he said "Keep the child and the train will stop and let the lady off"——
Q. The- what did your father do?
A. He started to get back on the train.
Q. Did you see him get on?
A. Yes sir, I think I did.
Q. What car did he get on?
A. He got on the car in front of the platform on which the lady was standing.
Q. Now describe in your own way what happened?
A. Well, just then—I don't know whether the lady asked anyone to put the child back, but some one thought she did, and just then this boy, who I thought was a train official, came up and took the child and started to put the child on, and I watched him for a second, and he appeared to put the child on, and then I turned around and started away; I didn't see the accident.
266 Q. You didn't see him further than his first attempt to put the child on the train?
A. No, I thought that he put it on.
Q. Do you know who that boy was?
A. I afterwards learned it was Carl Jones.
Q. Then did you go away at that time?
A. I started north.
Q. Do you know where the depot is at Edmond?
A. Yes sir.
Q. And you know where the bay window is?
A. Yes sir.
Q. Where with reference to the bay window was the south end of the coach, that you saw this mother,—the mother of the little boy,—get on?
A. A little south of the bay window.
Q. Right close by?
A. Well, yes, fairly close.
Q. The light was shining out of the bay window, was it not?

A. Yes sir.
Q. Was there a light also in the car, do you remember?
A. I could not say; I suppose there was.
Q. You didn't notice?
A. No.

Cross examination.

By Mr. HOWARD:

Q. How long have you know- Carl Jones?
A. Since the accident.
Q. You don't remember him before?
A. No.
Q. Why did you think that he was one of the train men?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial. Overruled. Exception.

A. Why he had on a suit; I thought it was blue; and I thought he was a train official, because he had on an official uniform.
Q. Could you see him distinctly?
A. Well, he was right by me.
Q. You could see he had on a uniform?
A. Yes sir.

Mr. ASP: What was he at the time; he wasn't in the train employ was he?
A. No.
Q. Do you know who he was working for?
A. I afterwards learned that he was working for the OK. Bus & Baggage company.

267 Defendant rests.

Rebuttal.

ANNA CALHOUN (Mrs.) is the next witness called to the stand by the plaintiff in rebuttal, and gives the following testimony under oath:

By Mr. HOWARD:

Q. Samuel Calhoun, this plaintiff, is your son, is he?
A. Yes sir.
Q. Did you hear the statement of the conductor on the train that night with reference to the conversation which he says he had with you after the train left Guthrie?

Mr. ASP: Objected to as incompetent, irrelevant and immaterial and not proper rebuttal; the attention of the witness was called to that special conversation on her former examination in chief. She has had her opportunity to testify on that proposition.
The COURT: She denied the conversation then; I don't know what

the purpose is, he may want to direct her attention to some particular feature of that——

Mr. HOWARD: The only point in this: That the counsel in presenting the matter to her on cross-examination, did not put it just as the conductor put it.

The COURT: Go ahead.

Q. Do you know what he said in his testimony?

A. Yes.

Q. You may state to the Jury, Mrs. Calhoun whether there was any conversation or any circumstance of that character or resembling that, occurred after the train left Guthrie?

Mr. ASP: We object to the form of the question, and as incompetent, irrelevant and immaterial, and not proper rebuttal.

Objection sustained to the form of the question.

Q. You may state whether that conversation occurred?

A. That conversation did not occur.

Mr. HOWARD: That is all.

Mr. ASP: That is all.

Mr. HOWARD: Just one question more, Mrs. Calhoun, is that the check the conductor gave you that night? (Handing wit-
268 ness.)

A. Yes sir.

Q. You may state whether or not he called for it at any time?

A. He never called for it at any time.

That's all. That's all.

Plaintiff rests and the Evidence is closed.

269 In the District Court of Oklahoma County, Oklahoma Territory.

#4054.

SAMUEL CALHOUN, by His Next Friend, ANNA CALHOUN, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the plat prepared by H. W. Wagner hereto attached of the station of Edmond, Oklahoma County, Oklahoma Territory, showing the dimensions thereon is a correct plat of such station of Edmond, and that the dimensions marked thereon are the correct dimensions, that said plat is drawn to a scale of one inch to the

twenty feet, and is a correct plat showing the station of Edmond, and its surroundings, depot, platforms and the tracks, as they existed on the 24th day of August, 1903, the time when the accident complained of in this action occurred, and may be used in evidence by either party to this action without objection by either party.

SAMUEL CALHOUN,
By SAM HOOKER, *His Attorney.*
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
By HENRY E. ASP, *Its Attorney.*

"Exhibit B."

(Here follows plat marked p. 269*a*.)

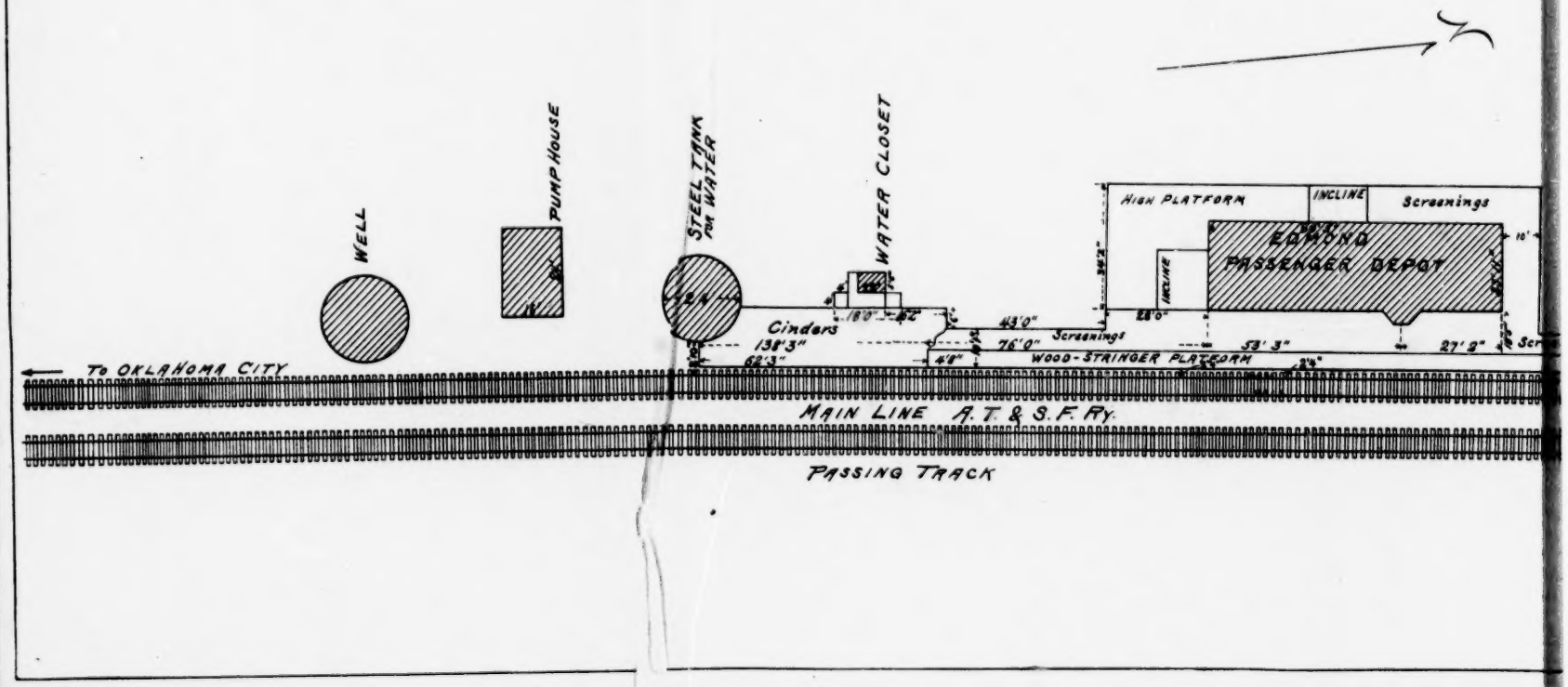
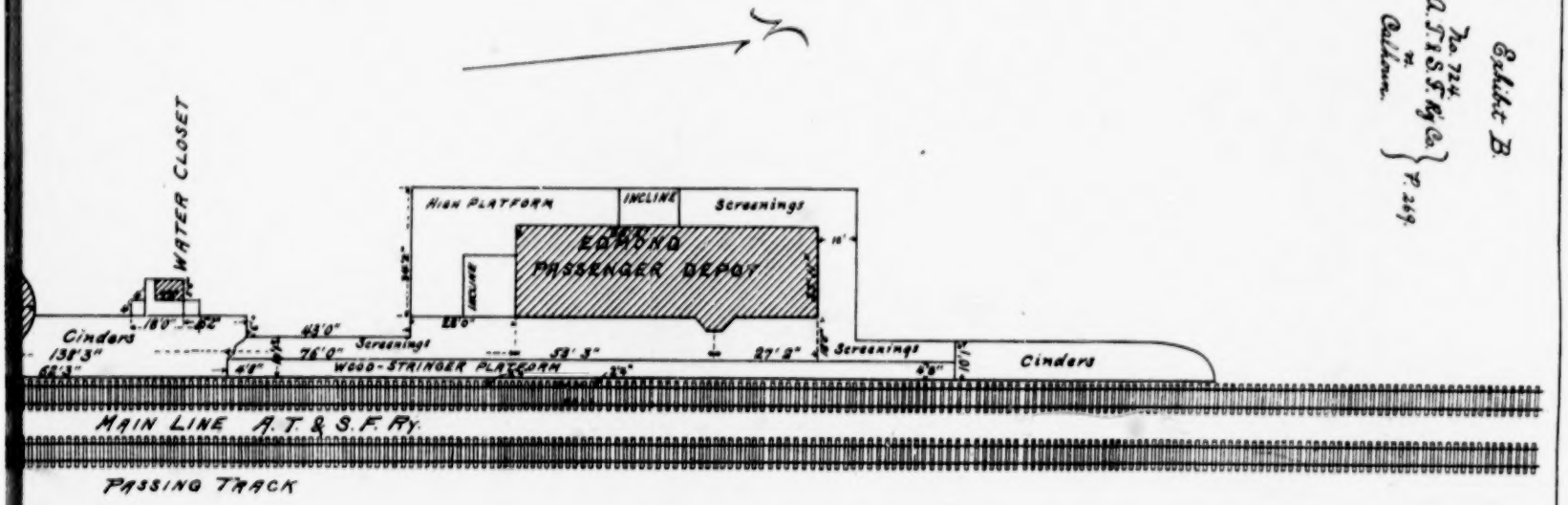

WELL
PUMP HOUSE
STEEL TANK FOR WATER
WATER CLOSET
HIGH PLATFORM
INCLINE
Screenings
EDMOND PASSENGER DEPOT
INCLINE
Cinders
Screenings
WOOD-STRINGER PLATFORM
To OKLAHOMA CITY
MAIN LINE A. T. & S. F. RY.
PASSING TRACK

Exhibit B.

No. 724
A. T. & S. F. Ry. Co.
vs.
Coldiron.
} P. 269.



MAP
of
A. T. & S. F. Ry.
DEPOT and PLATFORM
AT
EDMOND O. T. OKLAHOMA CO.

Scale 1" = 20'

Correct H. W. Wagner

270 TERRITORY OF OKLAHOMA, *County of Oklahoma, ss.*

I do hereby certify that the within and foregoing transcript is a full, true and complete record of all the evidence introduced upon the trial of the above cause.

Witness my hand this the 7" day of November A. D. 1905.

FRANK W. INGLIS,
Court Reporter Oklahoma County, Oklahoma Territory.

Be it further remembered that the above and foregoing is all the evidence taken upon the trial introduced in said cause, both on the part of the plaintiff and on the part of the defendant, and the foregoing is all the evidence introduced and taken on the trial of said cause.

271 And thereupon on the first day of December, A. D. 1904, the said cause came on for trial, the issues having been joined and the parties having announced themselves ready for trial and a jury was duly empannelled and sworn to try said cause; and the court duly caused an entry to be made on the journal of said court of the proceedings on said trial on the first day of December, A. D. 1904, which said journal entry on the journal of the court is in words and figures as follows, to wit:

272 No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Journal Entry.

And now on this first day of December, A. D., 1904, the same being one of the judicial days of the October, A. D. 1904, term of this court this cause comes on for hearing, having been duly and regularly reached for trial, the plaintiff appearing by H. H. Howard, Thos. C. Chambers and Sam Hooker, his attorneys, and the defendant appearing by Henry E. Asp, and Geo. M. Green, its attorneys, and thereupon comes a jury of twelve good and lawful men having been heretofore empanelled, who are duly empanelled and sworn to try said cause, and thereupon the plaintiff states his case to the jury, and thereupon the defendant states its case to the jury, and

Thereupon the defendant objects to the introduction of any evidence by the plaintiff herein for the reason that the plaintiff's petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against defendant, and that the statement of plaintiff's cause by his counsel shows he is not entitled to recover, which objection is overruled by the court, and to which ruling of the court the defendant duly excepted and still excepts, and thereupon the plaintiff proceeds to the introduction of his testimony and

concludes the same and rests his case, and thereupon defendant files its demurrer in writing to the evidence of the plaintiff upon the grounds and for the reason that the evidence introduced by the plaintiff herein is not sufficient and does not prove or tend to prove a cause of action in favor of the plaintiff and against the defendant, which demurrer is considered by the court and overruled by the court and to which ruling of the court the defendant duly
273 excepted and still excepts. And thereupon the defendant proceeds to the introduction of its evidence, and pending the introduction of the defendant's evidence the hour for an adjournment having arrived, the further hearing of this case is adjourned until tomorrow morning, December 2nd, 1904, at the hour of nine o'clock, to which time the jury having been duly admonished are permitted to separate.

B. F. BURWELL, *Judge.*

OK.
B. D. S.

274 I think this is all right, except as to statement of case by attorney for plaintiff of which I have no recollection.

H. H. HOWARD.

Endorsed: No. 4054. Samuel Calhoun by Anna Calhoun, his next friend, *v.* A. T. & S. F. Ry Co. Journal Entry, Dec. 1, 1904, Filed in District Court, Oklahoma County, O. T., Dec. 13, 1904, B. D. Shear, Clerk by Will H. Clark, Deputy.

And thereafter on the second day of December A. D. 1904, said cause being still on trial, the Court duly caused an entry to be made on the journal of said court of the proceedings on said trial on said second day of December 1904, which said entry on the journal of the court is in words and figures following, to wit:

275 No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Journal Entry.

And now on this 2nd day of December, A. D. 1904, the same being one of the judicial days of the October, A. D. 1904, term of this court, this cause comes again on for hearing, pursuant to the adjournment of yesterday, and the parties appearing as of yesterday and the jury all being present.

And thereupon the defendant again proceeds with the introduction of its testimony and concludes the same and rests its case and the plaintiff proceeds to the introduction of his testimony in rebuttal and concludes the same and rests his case, and thereupon

the defendant moves the court for a peremptory instruction to the jury to find for the defendant, and pending the argument and consideration of said motion the hour for adjournment having arrived the further consideration of this case is adjourned until tomorrow morning, December 3rd, 1904, at the hour of nine o'clock to which time the jury being duly admonished is permitted to separate.

B. F. BURWELL, *Judge.*

O. K.
B. D. S.

This is also all right if date is correct.

H. H. HOWARD.

Endorsed: No. 4054. Samuel Calhoun by Anna Calhoun, his next friend, *v.* A. T. & S. F. Ry. Co. Journal Entry, Dec. 2, 1904. Filed in District Court, Oklahoma County, O. T. Dec. 13, 1904. B. D. Shear, Clerk, by Will H. Clark, Deputy.

276 And thereupon on the 3rd day of December, A. D., 1904, said cause being still on trial, the court duly caused an entry to be made on the journal of said Court of the proceedings on said trial on said 3rd day of December A. D. 1904, which said entry on the journal of the court is in words and figures following, to wit:

277 No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Journal Entry.

And now on this 3rd day of December, A. D. 1904, the same being one of the judicial days of the October, A. D. 1904, term of this court this cause comes again on for hearing pursuant to the adjournment of yesterday, and the parties appearing as of yesterday, and the jury all being present, and thereupon the further hearing on said motion of the defendant for a peremptory instruction is proceeded with and is concluded and the court takes the same under advisement until Monday morning December 5th, 1904, at the hour of nine o'clock and to which time the further hearing of this cause is adjourned and to which time the jury having been duly admonished are by agreement of the parties hereto permitted to separate.

B. F. BURWELL, *Judge.*

O. K.
B. D. S.

This is all right. It is remembered that the jury separated by agreement of the parties.

H. H. HOWARD.

Endorsed: No. 4054. Samuel Calhoun by Anna Calhoun, his next friend, *v.* A. T. & S. F. Ry. Co. Journal Entry, Dec. 3, 1904. Filed in District Court, Oklahoma County, O. T. Dec. 13, 1904. B. D. Shear, Clerk, by Will H. Clark, Deputy.

278 And thereafter on the fifth day of December, A. D. 1904, said cause being still on trial, the court duly caused entry to be made on the journal of said court of the proceedings on said trial on said fifth day of December, A. D. 1904, which said entry on the journal of the court is in words and figures following, to wit:

279 No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
against
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Journal Entry.

And now on this 5th day of December, A. D. 1904, the same being one of the judicial days of the October, A. D. 1904, term of this court, this cause comes again on for hearing pursuant to the adjournment of Saturday, December 3rd, and the parties appearing as heretofore, and the jury all being present, the court overrules said motion of the defendant for a peremptory instruction to find for the defendant to which ruling of the court the defendant duly excepted and still excepts, and thereupon the court having been thereunto duly requested at the beginning of the trial instructs the jury in writing as to the law of the case and the cause is argued to the jury by counsel for plaintiff and defendant, and the court at the request of the defendant, submits to the jury certain special questions of fact for the jury to answer.

And thereupon the jury retire under the charge of a sworn officer of the court to deliberate of their verdict.

B. F. BURWELL, *Judge.*

O. K.
B. D. S.

O. K.
H. H. HOWARD.

Endorsed: No. 4054. Samuel Calhoun by Anna Calhoun his next friend *v.* The A. T. & S. F. Ry. Co. Journal Entry Dec. 5th, 1904, Filed in District Court, Oklahoma County, O. T. Dec. 13, 1904, B. D. Shear, Clerk, by Will H. Clark, deputy.

280 That said special findings as requested by the defendant, are in words and figures following, to wit:

In the District Court of Oklahoma County, Oklahoma Territory.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Request for Special Findings to be Submitted to the Jury.

Q. 1. How old was plaintiff, Samuel Calhoun, at the time of the accident?

Q. 2. Was he a passenger on defendant's train from Arkansas City, Kansas, to Edmond, Oklahoma, on the night of August 24th or 23rd, 1903?

Q. 3. Who was with the plaintiff, Samuel Calhoun, at the time?

Q. 4. If in answer to the last question you say that he was with Anna Calhoun state if the said Anna Calhoun was the mother of plaintiff?

Q. 5. How old was Anna Calhoun, the mother of plaintiff, at that time?

Q. 6. Was the plaintiff in the care and custody of his mother, Anna Calhoun, at the time he was such passenger between Arkansas City and Edmond?

Q. 7. Was the said Anna Calhoun an intelligent person at that time?

Q. 8. Was the said Anna Calhoun in good health at that time?

Q. 9. Was the said Anna Calhoun a cripple, sick or infirm in any way at the time?

Q. 10. Did the plaintiff, Samuel Calhoun, have a ticket upon which he was riding as a passenger between Arkansas City
281 and Edmond, or was he riding with his mother the said Anna Calhoun, upon a ticket purchased by her and upon which she was also riding?

Q. 11. Was Edmond the destination of plaintiff and his said mother?

Q. 12. Did one of defendant's employés call the station before the train stopped at Edmond station?

Q. 14. How long did the train stop at Edmond before the accident to plaintiff occurred?

Q. 15. How many passengers got off the car upon which plaintiff and his mother were riding at Edmond.

Q. 16. How many passengers boarded said car at Edmond on the occasion before the accident occurred?

Q. 17. When the mother of plaintiff started to leave the train with plaintiff did she carry or lead the plaintiff, Samuel Calhoun?

Q. 18. When plaintiff and his mother reached the platform of the car upon which they were riding was the train then moving out of Edmond station?

Q. 19. When plaintiff reached the platform of said car did his mother hand him to a bystander?

Q. 20. To whom did the mother of plaintiff hand the plaintiff?

Q. 21. If you say she handed the plaintiff to W. W. Robertson, to whose care did the said Robertson confide the plaintiff?

Q. 22. If you say that W. W. Robertson placed the plaintiff in the care of Walter Melville Robertson was Walter Melville Robertson the son of W. W. Robertson?

Q. 23. What instructions did W. W. Robertson give to his son, Walter Melville Robertson when he placed the plaintiff Samuel Calhoun in his care?

Q. 24. Was W. W. Robertson as employé of the defendant?

Q. 25. Was the said Walter Melville Robertson, to whom W. W. Robertson confided the care of the plaintiff, Samuel Calhoun, after receiving him from his mother, an employé of defendant?

282 Q. 26. Was the plaintiff, Samuel Calhoun, injured while alighting from the train on which his mother took passage with him from Arkansas City, Kansas, to Edmond, Oklahoma?

Q. 27. Did Anna Calhoun, plaintiff's mother, alight from the said train before the accident?

Q. 28. Was the said train in motion leaving Edmond when the plaintiff Samuel Calhoun was taken off of the train by W. W. Robertson?

Q. 29. At the time plaintiff, Samuel Calhoun, was taken off the train by W. W. Robertson, was the train moving too fast for plaintiff's mother safely to alight?

Q. 30. Did the plaintiff's mother, Anna Calhoun, remain on the train after the plaintiff, Samuel Calhoun, was taken off by W. W. Robertson, because she thought the train was running too fast for her to alight with safety?

Q. 31. Did the plaintiff's mother Anna Calhoun, after Samuel Calhoun was taken off of the train by W. W. Robertson, and at a time when she knew that the train was running too fast, for her to alight with safety, request that plaintiff, Samuel Calhoun, be placed back on the train?

Q. 32. To whom did Walter Melville Robertson give the custody of the plaintiff Samuel Calhoun?

Q. 33. If in answer to the last question you say that Walter Melville Robertson gave the custody of the plaintiff to Carl Jones, please say if the said Carl Jones was an employé of the defendant Railway Company.

Q. 34. Did Carl Jones run along side of the car to try and put the plaintiff, Samuel Calhoun, on the train?

Q. 35. If you answer the last question yes, how fast was the train going at the time?

Q. 36. Was the train running at that time too fast for a passenger to alight from or board the train with safety?

283 Q. 37. Did Carl Jones in trying to place plaintiff, Samuel Calhoun on the train run against a baggage truck on the platform of the defendant at said station of Edmond?

Q. 38. How far was it from the place where Carl Jones received

the plaintiff, Samuel Calhoun, from Walter Melville Robertson, to the place where he ran against the said truck?

Q. 39. Was the truck left on the platform opposite where the baggage car was stopped in the train when it stopped at the station of Edmond to enable passengers to alight from and board the said train?

Q. 40. How far from the south end of the coach in which plaintiff and his mother were riding when the train stopped for the station of Edmond to the place where the baggage truck was left on the platform?

Q. 41. Was the coach in which plaintiff and his mother were riding from Arkansas City to Edmond lighted?

Q. 42. Did the lights in said car shine out through the windows of the car on to the platform?

Q. 43. Was there a light in the bay window of the depot?

Q. —. Did such light shine out on to the platform where persons would alight from and enter the car in which plaintiff and his mother were passengers, from Arkansas City to Edmond?

Q. 45. Did the plaintiff and his mother come out of the south end of the car in which they were passengers when plaintiff's mother gave plaintiff to W. W. Robertson?

Q. 46. At the time plaintiff's mother handed plaintiff to W. W. Robertson where was the south end of said car with relation to the bay window in the depot?

Q. 47. Who was the conductor in charge of said train?

Q. 48. Where was the conductor at the time plaintiff's mother gave said plaintiff to W. W. Robertson?

Q. 49. Where was the conductor when Carl Jones was running along side of the train and trying to put plaintiff on the train?

284 Q. 50. Who was porter on said train?

Q. 51. Where was the porter when plaintiff's mother handed plaintiff to W. W. Robertson?

Q. 52. Where was the porter when Carl Jones was running along side of the train trying to put the plaintiff on the train?

Q. 53. Who was the flagman on the train?

Q. 54. Where was the flagman Benfer when the plaintiff was taken off of the train by W. W. Robertson?

Q. 55. Where was flagman Benfer when Carl Jones was running alongside of the train trying to put the plaintiff on the train?

Q. 56. Did either the porter, conductor or flagman know that the plaintiff and his mother were alighting from the train when the train started to pull out?

Q. 57. Did either of them know that Carl Jones was trying to place the plaintiff back on the train after the train had started to pull out and until after the accident?

Endorsed: #4054. Special findings. Filed in District Court, Oklahoma County, O. T. Dec. 6, 1904. B. D. Shear, Clerk, by Anna Hoover, Deputy.

285 And thereafter on the fifth day of December, A. D. 1904, at the close of the trial, the defendant requested the court to give to the jury its requested written instructions, from one to nineteen, both inclusive, which the court refused to do. That said instructions as requested with the endorsements thereon, are in words and figures following, to wit:

286 *Instruction* #1.

Requested by Defendant.

You are instructed that the plaintiff in this case has failed to prove a cause of action in favor of the plaintiff and against the defendant. You will, therefore, find for the defendant.

Refused and excepted to by the defendant.

B. F. BURWELL, *Judge.*

Instruction #2.

Requested by Defendant.

If you find from the evidence that defendant's train stopped at the Town of Edmond for a time reasonably long enough for the passengers, including Mrs. Calhoun and the plaintiff, to alight from the train, you will find for the defendant.

Refused & excepted to by defendant.

B. F. BURWELL, *Judge.*

Instruction #3.

Requested by Defendant.

You are instructed that if you find from the evidence that the defendant failed to stop its train a reasonable length of time to enable plaintiff and his mother to alight, and if you further find that the plaintiff or his mother attempted to alight from the train while in motion and running at such a rate of speed as to render the alighting from such train dangerous, you will find for the defendant.

Refused and excepted to by the defendant.

B. F. BURWELL, *Judge.*

287 *Instruction* #4.

Requested by Defendant.

You are instructed that the undisputed evidence in this case shows that the plaintiff successfully alighted from the train on which he was a passenger with his mother without injury and that so far as plaintiff was concerned the contract of carriage between

the plaintiff and defendant was successfully completed, and if the plaintiff was injured while attempting to board the train you will find for the defendant.

Refused and excepted to by the defendant.

B. F. BURWELL, *Judge.*

Instruction #5.

Requested by Defendant.

If you find from the evidence that the defendant failed to call the station and failed to properly light the station platform and further find from the evidence that the plaintiff was alighted from said train without injury to himself the negligence of the defendant in failing to call the station or properly light the platform cannot be said to have been a violation of its contract of carriage or the proximate cause of the injury, and you will find for the defendant.

Refused and excepted to by the defendant.

B. F. BURWELL, *Judge.*

288 *Instruction* #6.

Requested by Defendant.

If you find from the evidence that the defendant failed to announce the station, and further find that the defendant's train did not stop at the station long enough to enable plaintiff or his mother to alight therefrom, and you further find that when the plaintiff and his mother reached the platform for the purpose of alighting that the train was in motion and the platform was dark and the plaintiff and his mother could not see, the plaintiff or the mother of plaintiff would not be justified in handing the plaintiff off the train or in attempting to have the plaintiff placed back on the train while the same was in motion, and you will find for the defendant.

Refused & excepted to by the defendant.

B. F. BURWELL, *Judge.*

Instruction #7.

Requested by Defendant.

You are instructed that the plaintiff in this case was under the care and control immediately of his mother, Anna Calhoun, and being of tender age the acts and conduct of said Anna Calhoun were the acts and conduct of the plaintiff, and plaintiff is bound thereby. If you find from the evidence that Anna Calhoun handed the plaintiff to a bystander who placed the plaintiff in a place of safety, and thereafter the said Anna Calhoun, with full knowledge that the train was in motion, requested that plaintiff be placed back

on the train, and if you find that the act of placing the plaintiff back on the train was dangerous and that the danger could have been observed by a reasonably prudent person, you will find for the defendant.

289 Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*

Instruction #8.

Requested by Defendant.

A railroad company, while it is bound to give passenger a reasonable time and a reasonable safe place to alight, is not bound to assist its passengers in entering or leaving its cars. Such assistance cannot be claimed as a matter of right, unless the passenger is sick, infirm, blind, or aged, and known to the railroad company to be such. The evidence in this case does not show that the plaintiff or his mother would come under the above exceptions.

Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*

Instruction #9.

Requested by Defendant.

If you find from the evidence that when Mrs. Calhoun came out of the door of the coach onto the car platform the train was moving and Mrs. Calhoun thereafter handed the plaintiff to a stranger on the platform and prepared to alight and then observed that the train was moving at such a rate of speed as to make it dangerous for her to alight, changed her mind and requested the bystanders to return the plaintiff on the train, then I say to you, that the proximate cause of the injury was not the negligence of the defendant in failing to announce the station or failing to light the platform, but was the intervening negligence of Mrs. Calhoun and the plaintiff cannot recover in this action.

Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*

290 *Instruction* #10.

Requested by Defendant.

You are instructed that the fact of an accident or an injury having taken place in which plaintiff was hurt raises no presumption of negligence on the part of the defendant.

Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*

Instruction #11.

Requested by Defendant.

You are further instructed that if you find from the evidence that the defendant failed to announce the station of Edmond and further find from the evidence that the defendant stopped the train at said station a reasonable time for passengers to get off and on the train and that the said train was stopped at a place where a suitable platform was provided for entering and leaving the train, and you further find from the evidence that the said train had a baggage car and carried the bagg-e of its passengers and that the defendant had a truck on the platform at the said baggage car which said truck was left on the platform at a place where passengers were not required to enter or leave the train, you are instructed that the leaving of such truck upon the platform at said place, not intended or necessary for the use of passengers in alighting from or entering the train, such action on the part of the defendant was not negligence, and if you find from the evidence that after plaintiff had alighted from the train his mother requested the bystanders to put him back on the train, the train then being in motion, and a stranger not in the employ of the company undertook to put the plaintiff on the train and followed the train while it was in motion, running for a distance of one hundred feet or more, and struck against the truck which was in a proper place, you will find for the defendant.

291 Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*

Instruction No. 12.

Asked by Defendant.

The jury is instructed that in this case, though you may find that the defendant was negligent in failing to call the station of Edmond, or failing to stop its train a reasonable length of time for its passengers to disembark, and in failing to provide reasonable and proper facilities for that purpose, yet, if plaintiff sustained no injury by reason of that negligence, but did receive injuries by being attempted to be placed back on the train by a passenger or other person not connected in any manner with the railroad, after it had started moving, under circumstances that rendered putting said plaintiff on the train dangerous, and the act of such passenger in attempting to place plaintiff on the moving train was not such an act as might reasonably have been anticipated under ordinary circumstances from defendant's negligent acts, as a natural and probably result thereof, then the act of such third person was an independent cause of the injury, and defendant would not be liable therefor.

Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*

292 *Instruction No.* 13.

Requested by Defendant.

The Court instructs the jury that a Railway Company has the right to presume that passengers will only attempt to get on and off its cars at the places designated by the Company for such purpose, and it is not the duty of the Railroad Company to keep it- tracks or platforms clear for those who may see proper to pursue the cars while leaving a depot or station.

Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*

Instruction No. 14.

Asked by Defendant.

The Court instructs the jury that if you find from the evidence that plaintiff Samuel Calhoun at the time of the injury was an infant of tender years, to wit: three years of age or less and you further find from the evidence that his mother Anna Calhoun purchased from the defendant at Arkansas City, Kansas, one ticket for herself to Edmond, Oklahoma, and that under the rules of the Railway Company, she was permitted to take with her without extra charge, her infant son, the said Samuel Calhoun, plaintiff herein, then the Railway Company had the right to presume that the said Anna Calhoun would properly care for and guard the said child from danger; and if you further find that the said Anna Calhoun without the knowledge of the servants of the Railway Company attempted to alight from said train while in motion and handed plaintiff off from said train while in motion to a stranger, and because of the fact that said train was in motion at that time at such a rate of speed that the said Anna Calhoun on account of her own personal safety refused to alight, and while said train was so in motion requested or permitted the said Carl Jones to attempt to place plaintiff back

293 on the train then such conduct on the part of the said Anna Calhoun would constitute negligence that would preclude the plaintiff from recovering in this action even though you should further find that defendant's servants failed to call said station of Edmond upon the approach of said train and failed to light the platform of said station, and even though you should further find that the leaving of said truck on the platform at the place where the same was left was negligence on the part of the defendant.

Refused & excepted to by defendant.

B. F. BURWELL, *Judge.*

Instruction No. 15.

Asked by Defendant.

The Court instructs the jury that a Railway Company may presume that a parent in charge of an infant of tender years, to wit: three years of age while riding with such parent upon a railway train will properly care for and guard such child from injury; and if such parent is negligent in the care of such child such negligence will be in law the negligence of such child, and if an infant is injured while alighting from or boarding a railway train and the negligence of the parent contributes to such injury the infant cannot recover.

Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*

294 *Instruction* #16.

Asked by Defendant.

The Court at the request of the defendant has submitted to you certain special questions of fact for you to answer, and you are instructed that it is your duty to answer each one of these questions fairly as you shall find the truth to be under the evidence and without regard to your general verdict.

Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*

Endorsed: 4054. Instructions asked by Def't. Filed in District court Oklahoma County, O. T. Dec. 5, 1904. B. D. Shear, Clerk, by Will H. Clark, Deputy.

Instruction No. 17.

Requested by Defendant.

You are further instructed that if you find from the evidence that the defendant failed to announce the station of Edmond and further find from the evidence that the defendant stopped the train at said station a reasonable time for passengers to get off and on the train and that the said train was stopped at a place where a suitable platform was provided for entering and leaving the train, and you further find from the evidence that the said train had a baggage car and carried the baggage of its passengers and that the defendant had a truck on the platform at the said baggage car which said truck was left on the platform at a place where passengers were not required or expected to enter or leave the train in question you are instructed that the leaving of such truck upon the platform at said place not intended or necessary for the use of passengers in alighting from or entering the train, such action on the part of

the defendant was not negligence, and if you find from the evidence that after plaintiff had alighted from the train a stranger not in the employ of the defendant, without the knowledge or con-
295 sent of the defendant undertook to put the plaintiff on the train and followed the train while in motion, running for a distance of one hundred feet or more, carrying the plaintiff, under such circumstances that a reasonable prudent person ought to have recognized the danger, and ran against such truck, which caused the injury, you will find for the defendant.

Refused and excepted to by defendant.

B. F. BURWELL, *Judge.*

Endorsed: 4054. Instruction asked by defendant. Filed in District Court, Oklahoma County, O. T. Dec. 2, 1904. B. D. Shear, Clerk, by Will H. Clark, Deputy.

Instruction No. 18.

Requested by Defendant.

The Court instructs the jury that in determining whether the act of the defendant complained of is the proximate cause of the injury the legal test is; Was the injury of such a character as might reasonably been foreseen or expected as the natural result of the act complained of. A party is not chargeable with responsibility for results which do not naturally and reasonably follow as the consequence of his conduct; as a matter of law a party cannot be held (helf) responsible for injuries which could not reasonably been foreseen or expected as the result of his conduct.

Refused & excepted to by defendant.

B. F. BURWELL, *Judge.*

Endorsed: 4054. Instruction asked by Def't. Filed in District Court Oklahoma County O. T. Dec. 2, 1904. B. D. Shear, Clerk, by Will H. Clark, Deputy.

296 *Instruction No.* 19.

Asked by Defendant.

The Court instructs the jury: That where witnesses have testified that they did not hear, or that certain words were not spoken at a certain time or place, such testimony is what is termed in law as negative testimony and that such testimony is not entitled to as much weight or consideration at the hands of the jury as the testimony of equally creditable witnesses who testify to having heard such words spoken on such occasion, such testimony that the witness did hear being what is termed by the law positive or affirmative evidence.

Refused & excepted to by defendant.

B. F. BURWELL, *Judge.*

Endorsed: 4054. Instruction asked by defendant. Filed in District Court, Oklahoma County, O. T. Dec. 2, 1904. B. D. Shear, Clerk by Will H. Clark, Deputy.

And thereupon and on the 5th day of December, A. D. 1904, and at the close of the evidence, the court proceeded to instruct the jury, which said instructions as given by the court are in words and figures following, to wit:

297 In the District Court of Oklahoma County, Oklahoma Ter.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Instructions.

Gentlemen of the jury, in this case the court instructs you as follows: This is an action commenced by the plaintiff against the Atchison, Topeka and Santa Fe Railway Company, to recover the sum of $25,000.00 for an injury which he alleges he sustained, by reason of the negligence of the defendant company, as set out and charged in plaintiff's petition: and to this petition the defendant has filed an answer which is, first a general denial, and then alleges affirmative matter. And to this answer the plaintiff has filed a reply which is a general denial. And the issue for you to determine, from the evidence under the instructions of the court, is as to whether the plaintiff is entitled to recover and, if so, in what sum.

The burden is upon the plaintiff to establish his right to recover, by a preponderance of the evidence, and by a preponderance of the evidence is not necessarily meant the testimony of the greater number of witnesses relative to any matter in issue; but by a preponderance of the evidence is meant that evidence which, in the light of all the facts and circumstances appearing upon the trial, is entitled to the more weight and credit.

It is the duty of railroad employees running a railway train to call the names of the stations along the line of road a sufficient length of time before the train reaches the respective stations to enable the passengers for such station to collect their baggage and have a reasonable length of time to get ready to quit the train at such point; but if the conductor on the train in question informed Mrs. Cal-
298 houn just after the train left South Guthrie, that the next stop would be at Edmond then and in that event, so far as this case is concerned, it is immaterial as to whether the employés or any of them called the station of Edmond before the train reached that place; but as to whether the conductor notified the mother of the plaintiff just after the train left South Guthrie that the next stop would be at Edmond or as to whether the employés of the Company called the station of Edmond before the train reached that

point you are to determine in the light of all the facts and circumstances appearing upon the trial. And the burden would be upon the plaintiff to establish that the station of Edmond was not called in the usual manner but the burden would be upon the Company to establish that the conductor notified the mother of plaintiff just after the train left South Guthrie that the next stop would be at Edmond. The law presumes that events occur in the usual and ordinary way and one claiming an exception to the usual and general rule must establish such exception by a preponderance of evidence. Under the evidence in this case it has been shown that the plaintiff on the trip in question was traveling with his mother and that he was under the age at which the railroad company charges fare and under those circumstances it was the duty of the mother of the plaintiff, to care for him and protect him from injury. In other words the duty of looking after the plaintiff on this trip devolved upon the mother of the plaintiff, and not upon the employés of the railroad company; and if the conductor informed the mother of the plaintiff just after the train had left South Guthrie that the next stop would be at Edmond or if the porter on the train called the station of Edmond in the usual and ordinary way a sufficient length of time before the train reached Edmond to enable the mother of the plaintiff to get ready to leave the train at that point then and in that event the railroad company would have fully performed its duty as
299 to notifying the mother of the plaintiff as to the station; and if notice was given in either of those ways the company had a right to presume that she would be prepared to get off the train when it stopped and if she failed to attempt to get off of the train until it started it was her duty to stay on the train until it could be stopped unless it reasonably appeared safe to alight, and she would not have the right to alight from a train which was moving so fast as to render it dangerous for her so to do, and it would also be negligence for her or any one else to attempt to place the plaintiff back on the train after he had been taken therefrom if such act reasonably appeared dangerous, and it would be no sufficient excuse, for placing the child in a perilous position to say that the mother and child were separated by the negligence of the defendant company, in failing to stop a sufficient length of time for both mother and child to alight, but you are also instructed that the negligence of the mother or of any other person is not chargeable to the plaintiff nor can his rights be affected thereby. A child of tender years who has not reached that age where it can distinguish a place of safety from one — danger cannot be defeated in its right to recover for personal injury for the negligence of others who have it in charge; and every one who wilfully, wantonly or negligently commits or omits to perform an act when such act is by law required of them, which might reasonably have been expected to result in such injury is jointly or severally liable to such infant; but in this connection you should remember that you cannot find a verdict against the railroad company just because the plaintiff was injured. The fact

that plaintiff is an infant may possibly arouse your sympathy but in this issue sympathy cannot lawfully be considered.

300 The plaintiff's rights in this trial are exactly the same as they would be if he were a grown person, except that contributory negligence cannot be attributed to him, but in this case the defendant company have a right to all of the presumption that would surround it in the running of its trains (of) if the plaintiff were an adult. In other words the company is not required to anticipate that persons in charge of infants will place them in a position of danger, and where this is done without the knowledge or consent of the employés of the company it will not be liable unless it has been guilty of some negligence for which an adult, acting as a reasonably prudent person might recover in similar circumstances.

It is admitted that the plaintiff was safely taken from the train in question and committed to the care of a young man on the depot platform, therefore, even though you find that the station of Edmond was not called that fact can only be considered by you for the purpose of explaining the respective positions of mother and child at that time and if the plaintiff recover it must be by reason of events and conditions subsequent to the time he was taken from the train. It is also undisputed that after plaintiff was placed upon the depot platform one Mr. Jones, picked it up and attempted to return it to its mother. The defendant company contends that this was done at the request of the mother while the mother contends that she told Jones to stand back and protested against him trying to put the child back on the train, but it is undisputed that Jones in trying to put the child back on the train, struck a truck and fell, and the plaintiff, by reason thereof, came in contact with the moving train and lost his foot. Now, bearing in mind the rules of law which are given in these instructions before the plaintiff can recover it must affirmatively appear by a

301 preponderance of the evidence, either first: that a reasonable time was not given the passengers to alight and that the employés of the company or some one of them saw Jones trying to put the child back on the train and give it to its mother and that such employé or employés knew or ought to have known that such act would probably result in injury to plaintiff or that the injury to plaintiff might reasonably have been anticipated as the result of such act, and that with such knowledge said employés negligently failed to stop the train, when they reasonably could have done so, or second; that the company was guilty of negligence in leaving the truck in a dangerous position and in not having the depot platform properly lighted and that such condition directly and approximately contributed to the injury; and in this connection you are instructed that in order to recover for injury claimed to be the result of some negligence on the part of another a plaintiff must not only prove that the injury was the direct and approximate result of such negligence, but it must appear that the injury is such as might have been reasonably expected to flow from such negligent act or omission. It is not sufficient to authorize a judgment against the defendant in this case to be able to find that in the realm of

speculation the injury in question might occur as the result of the conditions on the platform but to establish such negligence as will render the defendant liable you must be able to find from the evidence that the injury was the natural result of such negligence and such as should in the ordinary course of human events have been reasonably anticipated. The company have a right to use trucks on its platform for the loading and unloading of express and baggage and if in using such trucks, the company employ every reasonable precaution to avoid injury to persons getting on and off of its passenger trains that is all that the law requires; and in determining as to whether the company used reasonable care to avoid injury in this case you may take into consideration the
302 length of the platform, the condition of light or darkness on the platform together with all of the other facts and circumstances surrounding the transaction, and you should in this connection also take into consideration the fact as to whether or not the truck was at the time of the accident on or off of that part of the platform used by passengers for getting on and off of its trains. A railroad company have a legal right to adopt such rules and regulations as are necessary for the convenient and economical conducting of its business, provided, however, that the accommodations provided are sufficient to meet the demands of the business, and are all that are reasonably necessary under the circumstances. And in determining as to whether or not the defendant is liable in this case you should also take into consideration the place of the accident; that is as to whether it occurred on or off that part of the depot used by passengers, as the company would have a right to presume in the absence of actual knowledge that persons would not attempt to get on a fast moving train after it had passed the passenger platform; but all the issues of fact are to be determined by you under the rules laid down in these instructions.

In this case the witnesses have disagreed as to whether or not the porter called the station prior to the time that the train reached the station of Edmond and in this connection you are instructed, that the testimony of a witness who testifies affirmatively that he heard the station called, would be entitled to more weight than the testimony of one who testified that he did not hear it called, provided, however, that — believe them to be entitled to equal credit as to truth and veracity for it is well known that in the ordinary affairs of life, where two persons have equal facilities for seeing an object or hearing a sound, the one may see or hear the object or sound and the other may not, depending largely upon whether or not the mind is preoccupied by something else.

303 The plaintiff in this case as stated before is not entitled to recover simply because he received an injury. The evidence must go further and show that the injury was occasioned by some negligent act or acts on the part of the defendant company, which, in the exercise of reasonable diligence should have been foreseen and avoided and that the injury was the natural, direct and approximate result of such negligence. Should you find for the plaintiff in this case your verdict must be reasonable and not excessive and should

be in such sum only as will be a reasonable compensation for the injury sustained which shall include a reasonable compensation for pain and suffering and for the loss of plaintiff's foot.

You should try this case just the same as you would try it if both parties were private individuals, and you should not if, you find for the plaintiff return a verdict for a greater sum than you would if the defendant were a private individual and not a railroad company.

You are the sole judges of the weight of the evidence and the credibilty of the witnesses and the law is that where two or more witnesses testify directly opposite to each other, you (and) are not bound to regard the weight of evidence as evenly balanced; but in determining the weight and credit that shall be given to the testimony of any witness, you may take into consideration his appearance upon the stand, his manner of testyfing, his apparent candor, and fairness or lack of the same, his intelligence or lack of intelligence, his interest or lack of interest in the result of the action, his opportunities or lack of opportunities for seeing and knowing the facts about which he testifies; and together with all of the other facts and circumstances appearing upon the trial, determine the weight and credit that shall be given to the testimony of any witness and give credit accordingly.

304 You are further instructed that if you find and believe that any witness had wilfully testified falsely relative to any material matter in issue, you may disregard all of the testimony of such witness, except in so far as it may be corroborated by the testimony of other credible witnesses or by that of another credible witness or by some other fact or circumstance appearing upon the trial.

You will consider these instructions altogether; you have no right to consider any part or parts of them to the exclusion of other portions thereof.

After you shall have retired to your jury room you will select one of your number as foreman, and when you shall have agreed upon a verdict, he will sign it, as such and you will all return with it into court.

You must be unanimous in your conclusions, unless you all agree no verdict can be found.

Forms of verdict will be handed you by the court.

Dated this 5th day of December, 1904.

B. F. BURWELL, *Judge.*

Endorsed: # 4054. In the District Court of Oklahoma County, O. T. Samuel Calhoun *vs.* A. T. & Santa Fe R. R. Co. Instructions. Filed December 6, 1904. B. D. Shear, Clerk.

I hereby certify the above to be a true copy of the instructions given in the case of Samuel Calhoun, *vs.* A. T. & S. F. R. R. Co. No. 4054.

Witness my hand and seal Dec. 7, 1904.

[SEAL.] B. D. SHEAR, *Clerk.*

305 Be it further remembered that at the time the court instructs the jury as aforesaid and before such instructions are read to the jury the defendant objects and excepts to the same as a whole, because such instructions are not separately stated and numbered as requested and as required by statute, and because such instructions are conflicting and misleading and do not correctly state the law of the case.

And the defendant also specifically excepts to that part of such instructions as given and stated on pages 233-4-5 in this case made, beginning with the word "it" in line four, counting from the bottom on page 233 in this case made, to and including the word "station" found on page 235 in line six, counting from the top of said page.

The defendant also specifically excepts to that part of such instructions as given and stated on page 235 in this case made, beginning with the word "if" found on line seven on page 235 of this case made, to and including the word "alight" found on line 20 counting from the top of said page of said case made.

The defendant also specifically excepts to that part of such instructions as given and stated on page 235 of this case made beginning with the word "but" found on line 20, counting from the top of page 235 of this case made, to and including the word "infant" found in line 2 counting from the top on page 236 of this case made.

The defendant also specifically excepts to that part of such instructions as given and found on pages 237-8 of this case made, beginning with the word "now" found on the sixth line counting from the top of page 237 of this case made, to and including the word "anticipated," found in line five on page 238, counting from the top, of this case made.

The defendant also specifically excepts to that part of such instructions as given and stated on page 238 of this case made, beginning with the word "the" found in the fifth line of said page, counting from the top, to and including the word "trains" found in
306 line seventeen, counting from the top of said page.

The defendant also specifically excepts to that part of such instructions as given and stated on page 238 of this case made beginning with the word "A" found in the seventeenth line, counting from the top, on said page to and including the word "circumstance" found in the twenty-second line, counting from the top, on said page.

The defendant also specifically excepts to that part of such instructions as given and stated on pages 238 of this case made, beginning with the word "And" found in the twenty-second line, counting from the top on said page, to and including the word "instructions" found in the second line, counting from the top, on page 239 in this case made.

307 And thereupon and on the sixth day of December A. D. 1904, the jury returned into court with their general verdict, which said general verdict is in words and figures following, to wit:

In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting in and for Oklahoma County.

SAMUEL CALHOUN, Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE R. R. Co., Defendant.

Verdict.

We, the jury, drawn, empannelled and sworn in the above entitled cause, do upon out oaths find for the plaintiff and assess the amount of his recover- at $10,000 00/100.

JOHN Q. SPENCER, *Foreman.*

Endorsed: No. 4054. Calhoun, Plaintiff, *vs.* A. T. & S. F. R. R. Defendant. Verdict. Filed in District Court of Oklahoma County, O. T. Dec. 6, 1904. B. D. Shear, Clerk, by Anna Hoover, Deputy.

308 And thereupon and on the same date, to wit, December sixth, A. D. 1904, the jury returned into court with the special findings of fact with their answers thereto, which said special findings of fact with the answers of the jury thereto are in words and figures following, to wit:

309 In the District Court of Oklahoma County, Oklahoma Territory.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Request for Special Findings to be Submitted to the Jury.

Q. 1. How old was plaintiff, Samuel Calhoun, at the time of the accident?

Answer. Between two and three years old.

JOHN Q. SPENCER, *Foreman.*

Q. 2. Was he a passenger on defendant's train from Arkansas City, Kansas, to Edmond, Oklahoma, on the night of August 24th or 23rd, 1903?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 3. Who was with the plaintiff, Samuel Calhoun, at the time?

Answer. His mother.

JOHN Q. SPENCER, *Foreman.*

Q. 4. If in answer to the last question you say that he was with Anna Calhoun, state if the said Anna Calhoun was the mother of plaintiff.

Answer. She was.

JOHN Q. SPENCER, *Foreman.*

Q. 5. How old was Anna Calhoun, the mother of plaintiff, at that time?

Answer. No evidence.

JOHN Q. SPENCER, *Foreman.*

Q. 6. Was the plaintiff in the care and custody of his mother, Anna Calhoun, at the time he was such passenger between Arkansas City and Edmond?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 7. Was the said Anna Calhoun an intelligent person at that time?

Answer. Yes.

JO-N Q. SPENCER, *Foreman.*

310 Q. 8. Was the said Anna Calhoun in good health at that time?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 9. Was the said Anna Calhoun a cripple, sick or infirm in any way at the time?

Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 10. Did the plaintiff, Samuel Calhoun, have a ticket upon which he was riding as a passenger between Arkansas City and Edmond, or was he riding with his mother, the said Anna Calhoun, upon a ticket purchased by her, and upon which she was also riding?

Answer. He was riding with his mother on her ticket.

JOHN Q. SPENCER, *Foreman.*

Q. 11. Was Edmond the destination of plaintiff and his said mother?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 12. Did one of defendant's employés call the station before the train stopped at Edmond Station?

Answer. It was not called.

JOHN Q. SPENCER, *Foreman.*

Q. 14. How long did the train stop at Edmond before the accident to plaintiff occurred?

Answer. One minute.

JOHN Q. SPENCER, *Foreman.*

Q. 15. How many passengers got off the car upon which plaintiff and his mother were riding at Edmond?
Answer. Two or three.

JOHN Q. SPENCER, *Foreman.*

Q. 16. How many passengers boarded said car at Edmond on that occasion before the accident occurred?
Answer. The evidence show five.

JOHN Q. SPENCER, *Foreman.*

Q. 17. When the mother of plaintiff started to leave the train with plaintiff, did she carry or lead the plaintiff, Samuel Calhoun?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

311 Q. 18. When plaintiff and his mother reached the platform of the car on which they were riding was the train then moving out of Edmond Station?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 19. When plaintiff reached the platform of said car did his mother hand him to a bystander?
Answer. She did.

JOHN Q. SPENCER, *Foreman.*

Q. 20. To whom did the mother of plaintiff hand the plaintiff?
Answer. W. W. Robertson.

JOHN Q. SPENCER, *Foreman.*

Q. 21. If you say she handed the plaintiff to W. W. Robertson, to whose care did the said Robertson confide the plaintiff?
Answer. Walter Melville Robertson.

JOHN Q. SPENCER, *Foreman.*

Q. 22. If you say that W. W. Robertson placed the plaintiff in the care of Walter Melville Robertson, was Walter Melville Robertson the son of W. W. Robertson?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 23. What instructions did W. W. Robertson give his son, Walter Melville Robertson when he placed the plaintiff, Samuel Calhoun, in his care?
Answer. Keep him.

JOHN Q. SPENCER, *Foreman.*

Q. 24. Was W. W. Robertson, an employé of the defendant?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 25. Was the said Walter Melville Robertson, to whom W. W. Robertson confided the care of plaintiff, Samuel Calhoun, after receiving him from his mother, an employé of the defendant?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

312 Q. 26. Was the plaintiff, Samuel Calhoun, injured, while alighting from the train on which his mother took passage with him from Arkansas City, Kansas, to Edmond, Oklahoma?
Answer. He was not.

JOHN Q. SPENCER, *Foreman.*

Q. 27. Did Anna Calhoun, plaintiff's mother, alight from the said train before the accident?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 28. Was the said train in motion leaving Edmond when the plaintiff Samuel Calhoun was taken off of the train by W. W. Robertson?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 29. At the time plaintiff, Samuel Calhoun, was taken off the train by W. W. Robertson, was the train moving too fast for plaintiff's mother safely to alight?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 30. Did the plaintiff's mother, Anna Calhoun, remain on the train after the plaintiff, Samuel Calhoun, was taken off by W. W. Robertson because she thought the train was running too fast for her to alight with safety?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 31. Did the plaintiff's mother, Anna Calhoun, after Samuel Calhoun was taken off of the train *to* W. W. Robertson, and at a time when she knew that the train was running too fast for her to alight safely, request that plaintiff, Samuel Calhoun be placed back on the train?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 32. To whom did Walter Melville Robertson give the custody of the plaintiff Samuel Calhoun?
313 Answer. To Carl Jones, thinking he was a railroad employé.

JOHN Q. SPENCER, *Foreman.*

Q. 33. If in answer to the last question you say that Walter Melville Robertson gave the custody of the plaintiff to Carl Jones, please say if the said Carl Jones was an employé of the defendant Railway Company?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 34. Did Carl Jones run alongside of the car to try and put the plaintiff, Samuel Calhoun, on the train?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 35. If you answer the last question yes, how fast was the train going at the time?
Answer. Four to eight miles an hour.
JOHN Q. SPENCER, *Foreman.*

Q. 36. Was the train running at that time too fast for a passenger to alight from or board a train with safety?
Answer. Yes.
JOHN Q. SPENCER, *Foreman.*

Q. 37. Did Carl Jones in trying to place plaintiff, Samuel Calhoun on the train run against a baggage truck on the platform of the defendant at said station of Edmond?
Answer. Yes.
JOHN Q. SPENCER, *Foreman.*

Q. 38. How far was it from the place where Carl Jones received the plaintiff, Samuel Calhoun from Walter Melville Robertson, to the place where he ran against the said truck?
Answer. Seventy-five to one hundred feet.
JOHN Q. SPENCER, *Foreman.*

Q. 39. Was the truck left on the platform opposite where the baggage car was stopped in the train when it stopped at the station of Edmond to enable passengers to alight from and board the said train?
Answer. No.
JOHN Q. SPENCER, *Foreman.*

314 Q. 40. How far from the south end of the coach in which plaintiff and his mother were riding when the train stopped for the station of Edmond to the place where the said baggage truck was left on the platform?
Answer. Seventy-five to one hundred feet.
JOHN Q. SPENCER, *Foreman.*

Q. 41. Was the coach in which plaintiff and his mother were riding from Arkansas City, to Edmond lighted.
Answer. Yes.
JOHN Q. SPENCER, *Foreman.*

Q. 42. Did the lights in said car shine out through the windows of the car on to the pl m?
Answer. No.
JOHN Q. SPENCER, *Foreman.*

Q. 43. Was there a light in the bay window of the depot?
Answer. Yes.
JOHN Q. SPENCER, *Foreman.*

Q. 44. Did such light shine out on to the platform where persons would alight from and enter the car in which plaintiff and his mother were passengers from Arkansas City, to Edmond?
Answer. No.
JOHN Q. SPENCER, *Foreman.*

Q. —. Did the plaintiff and his mother come out of the south end of the car in which they were passengers when plaintiff's mother gave plaintiff to W. W. Robertson?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 46. At the time plaintiff's mother handed plaintiff to W. W. Robertson, where was the south end of said car with relation to the bay window in the depot?
Answer. It was south.

JOHN Q. SPENCER, *Foreman.*

Q. 47. Who was the conductor in charge of said train?
Answer. Jackson.

JOHN Q. SPENCER, *Foreman.*

315 Q. 48. Where was the conductor at the time plantiff's mother gave said plaintiff to W. W. Robertson?
Answer. On the south end of the smoker.

JOHN Q. SPENCER, *Foreman.*

Q. 49. Where was the conductor when Carl Jones was running alongside of the train and trying to put the plaintiff on the train?
Answer. On the smoker.

JOHN Q. SPENCER, *Foreman.*

Q. 50. Who was the porter on said train?
Answer. Kenedy, colored.

JOHN Q. SPENCER, *Foreman.*

Q. 51. Where was the porter when plaintiff's mother handed plaintiff to W. W. Robertson?
Answer. Blind baggage.

JOHN Q. SPENCER, *Foreman.*

Q. 52. Where was the porter when Carl Jones was running alongside of the train trying to put the plaintiff on the train?
Answer. Blind baggage.

JOHN Q. SPENCER, *Foreman.*

Q. 53. Who was the flagman on the train?
Answer. Benfer.

JOHN Q. SPENCER, *Foreman.*

Q. 54. Where was flagman Benfer when the plaintiff was taken off of the train by W. W. Robertson?
Answer. On north end of sleeper.

JOHN Q. SPENCER, *Foreman.*

Q. 55. Where was flagman Benfer when Carl Jones was running alongside of the train trying to put the plaintiff on the train?
Answer. On north end of sleeper.

JOHN Q. SPENCER, *Foreman.*

Q. 56. Did either the porter, conductor or flagman know that the plaintiff and his mother were alighting from the train when the train started to pull out?

Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 57. Did either of them know that Carl Jones was trying to place the plaintiff back on the train after the train had started to pull out and until after the accident?

316 Answer. No.

JOHN Q. SPENCER, *Foreman.*

Endorsed: #4054. Special findings filed in District Court, Oklahoma County, O. T. Dec. 6, 1904. B. D. Shear, Clerk, by Anne Hoover, Deputy.

317 And thereupon and on the sixth day of December, the jury having returned into court with their general verdict and with the special findings of fact with their answers thereto and the court duly caused entry to be made on the journal of said court of the proceedings on said trial on the sixth day of December, A. D. 1904, which said entry on the journal of the court is in words and figures following, to wit:

318 No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Journal Entry.

And now on this 6th day of December, A. D. 1904, the same being one of the judicial days of the October, A. D. 1904, term of this court, the jury returned into court with their verdict, and with answers to the special findings of fact submitted to the jury by the court at the request of the defendant; the plaintiff appearing by H. H. Howard, Esq., T. G. Chambers, Esq., and Sam Hooker, Esq., his attorneys, and the defendant appearing by Henry E. Asp and George M. Green, its attorneys; which verdict is in the words and figures following, to wit:

"In the District Court of the Third Judicial District of the Territory of Oklahoma, Sitting in and for Oklahoma County.

SAMUEL CALHOUN, Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE R. R. CO., Defendant.

Verdict.

We the jury, drawn, empannelled and sworn in the above entitled cause, do upon our oaths find for the plaintiff and assess the amount of his recover- at $10,000 00/100.

JOHN Q. SPENCER, *Foreman.*

Endorsed: No. 4054. Calhoun, plaintiff *vs.* A. T. & S. F. R. R. Defendant. Verdict. Filed in District Court of Oklahoma County, O. T. Dec. 6, 1904, B. D. Shear, Clerk By Anne Hoover, Deputy."

319 And which special questions and the answers of the jury hereto are as follows, to wit:

"In the District Court of Oklahoma County, Oklahoma Territory.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Request for Special Findings to be Submitted to the Jury.

Q. 1. How old was plaintiff, Samuel Calhoun, at the time of the accident?
Answer. Between two and three years old.
JOHN Q. SPENCER, *Foreman.*

Q. 2. Was he a passenger on defendant's train from Arkansas City, Kansas, to Edmond, Oklahoma on the night of August 24th or 23rd, 1903?
Answer. Yes.
JOHN Q. SPENCER, *Foreman.*

Q. 3. Who was with the plaintiff, Samuel Calhoun, at the time?
Answer. His mother.
JOHN Q. SPENCER, *Foreman.*

Q. 4. If in answer to the last question you say that he was with Anna Calhoun, state if the said Anna Calhoun was the mother of plaintiff.
Answer. She was.
JOHN Q. SPENCER, *Foreman.*

Q. 5. How old was Anna Calhoun, the mother of plaintiff, at that time?
Answer. No evidence.
JOHN Q. SPENCER, *Foreman.*

Q. 6. Was the plaintiff in the care and custody of his mother Anna Calhoun, at the time he was such passenger between Arkansas City and Edmond?
Answer. Yes.
JOHN Q. SPENCER, *Foreman.*

Q. 7. Was the said Anna Calhoun an intelligent person at that time?
Answer. Yes.
JOHN Q. SPENCER, *Foreman.*

320 Q. 8. Was the said Anna Calhoun in good health at that time?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 9. Was the said Anna Calhoun a cripple, sick or infirm in any way at the time?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 10. Did the plaintiff, Samuel Calhoun, have a ticket upon which he was riding as a passenger between Arkansas City and Edmond, or was he riding with his mother, the said Anna Calhoun, upon a ticket purchased by her and upon which she was also riding?
Answer. He was riding with his mother on her ticket.

JOHN Q. SPENCER, *Foreman.*

Q. 11. Was Edmond the destination of plaintiff and his said mother.
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 12. Did one of defendant's employés call the station before the train stopped at Edmond station?
Answer. It was not called.

JOHN Q. SPENCER, *Foreman.*

Q. 14. How long did the train stop at Edmond before the accident to plaintiff occurred.
Answer. One minute.

JOHN Q. SPENCER, *Foreman.*

Q. 15. How many passengers got off the car upon which plaintiff and his mother were riding at Edmond.
Answer. Two or three.

JOHN Q. SPENCER, *Foreman.*

Q. 16. How many passengers boarded said car at Edmond on that occasion before the accident occurred?
Answer. The evidence show- five.

JOHN Q. SPENCER, *Foreman.*

Q. 17. When the mother of plaintiff started to leave the train with the plaintiff, did she carry or lead the plaintiff, Samuel Calhoun?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

321 Q. 18. When plaintiff and his mother reached the platform of the car on which they were riding was the train then moving out of Edmond station?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 19. When plaintiff reached the platform of said car did his mother hand him to a bystander?
Answer. She did.

JOHN Q. SPENCER, *Foreman.*

Q. 20. To whom did the mother of plaintiff hand the plaintiff?
Answer. W. W. Robertson.

JOHN Q. SPENCER, *Foreman.*

Q. 21. If you say she handed the plaintiff to W. W. Robertson to whose care did the said Robertson confide the plaintiff?
Answer. Walter Melville Robertson.

JOHN Q. SPENCER, *Foreman.*

Q. 22. If you say that W. W. Robertson placed the plaintiff in the care of Walter Melville Robertson, was Walter Melville Robertson the son of W. W. Robertson?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 23. What instructions did W. W. Robertson give to his son, Walter Melville Robertson when he placed the plaintiff, Samuel Calhoun, is his care?
Answer. Keep him.

JOHN Q. SPENCER, *Foreman.*

Q. 24. Was W. W. Robertson an employé of the defendant?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 25. Was the said Walter Melville Robertson, to whom W. W. Robertson confided the care of plaintiff, Samuel Calhoun, after receiving him from his mother, an employé of the defendant?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 26. Was the plaintiff, Samuel Calhoun, injured while alighting from the train on which his mother took passage with him from Arkansas City, Kansas to Edmond, Oklahoma.
Answer. He was not.

JOHN Q. SPENCER, *Foreman.*

322 Q. 27. Did Anna Calhoun plaintiff's mother, alight from the said train before the accident?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 28. Was the said train in motion leaving Edmond when the plaintiff, Samuel Calhoun was taken off of the train by W. W. Robertson?
Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. "9. At the time plaintiff Samuel Calhoun was taken off the train by W. W. Robertson, was the train moving too fast for plaintiff's mother safely to alight?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 30. Did the plaintiff's mother, Anna Calhoun, remain on the train after the plaintiff, Samuel Calhoun, was taken off by W. W. Robertson, because she thought the train was running too fast for her to alight with safety?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 31. Did the plaintiff's mother, Anna Calhoun, after Samuel Calhoun was taken off of the train *to* W. W. Robertson, and at a time when she knew that the train was running too fast for her to alight with safety, request that plaintiff Samuel Calhoun, be placed back on the train?

Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 32. To whom did Walter Melville Robertson give the custody of the plaintiff Samuel Calhoun?

Answer. To Carl Jones thinking he was a railroad employé.

JOHN Q. SPENCER, *Foreman.*

Q. 33. If in answer to the last question you say that Walter Melville Robertson gave the custody of the plaintiff to Carl Jones please say if the said Carl Jones was an employé of the defendant railway company?

Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 34. Did Carl Jones run alongside of the car to try and
323 put the plaintiff, Samuel Calhoun, on the train?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 35. If you answer the last question yes, how fast was the train going at the time?

Answer. Four to eight miles an hour.

JOHN Q. SPENCER, *Foreman.*

Q. 36. Was the train running at that time too fast for a passenger to alight from or board the train with safety?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 37. Dis Carl Jones in trying to place plaintiff, Samuel Calhoun on the train run against a baggage truck on the platform of the defendant at said station of Edmond?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 38. How far was it from the place where Carl Jones received the plaintiff, Samuel Calhoun, from Walter Melville Robertson, to the place where he ran against the said truck?

Answer. 75 to one hundred feet.

JOHN Q. SPENCER, *Foreman.*

Q. 39. Was the truck left on the platform opposite where the bag-e car was stopped in the train when it stopped at the station of Edmond to enable passengers to alight from and board the said train?

Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 40. How far from the south end of the coach in which plaintiff and his mother were riding when the train stopped for the station of Edmond to the place where the said baggage truck was left on the platform?

Answer. 75 to one hundred feet.

JOHN Q. SPENCER, *Foreman.*

Q. 41. Was the coach in which plaintiff and his mother were riding from Arkansas City to Edmond lighted?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

324 Q. 42. Did the lights in said car shine out through the windows of the car on to the platform?

Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 43. Was there a light in the *bow* window of the depot?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 44. Did the light shine out on to the platform where persons would alight from and enter the car in which plaintiff and his mother were passengers from Arkansas City to Edmond?

Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 45. Did the plaintiff and his mother come out of the south end of the car in which they were passengers when plaintiff's mother gave plaintiff to W. W. Robertson?

Answer. Yes.

JOHN Q. SPENCER, *Foreman.*

Q. 46. At the time plaintiff's mother handed plaintiff to W. W. Robertson where was the south end of said car with relation to the bay window in the depot?

Answer. It was south.

JOHN Q. SPENCER, *Foreman.*

Q. 47. Who was the conductor in charge of said train?
Answer. Jackson.

JOHN Q. SPENCER, *Foreman.*

Q. 48. Where was the conductor at the time plaintiff's mother gave said plaintiff to W. W. Robertson?
Answer. On the south end of the smoker.

JOHN Q. SPENCER, *Foreman.*

Q. 49. Where was the conductor when Carl Jones was running alongside of the train and trying to put the plaintiff on the train.
Answer. On the smoker.

JOHN Q. SPENCER, *Foreman.*

Q. 50. Who was porter on said train?
Answer. Kenedy, colored.

JOHN Q. SPENCER, *Foreman.*

Q. 51. Where was the porter when plaintiff's mother handed plaintiff to W. W. Robertson?
325 Answer. Blind baggage.

JOHN Q. SPENCER, *Foreman.*

Q. 52. Where was the porter when Carl Jones was running along side of the train trying to put the plaintiff on the train?
Answer. Blind baggage.

JOHN Q. SPENCER, *Foreman.*

Q. 53. Who was the flagman on the train?
Answer. Benfer.

JOHN Q. SPENCER, *Foreman.*

Q. 54. Where was flagman Benfer when the plaintiff was taken off of the train by W. W. Robertson.
Answer. On north end of sleeper.

JOHN Q. SPENCER, *Foreman.*

Q. 55. Where was flagman Benfer when Carl Jones was running alongside of the train trying to put the plaintiff on the train?
Answer. On north end of sleeper.

JOHN Q. SPENCER, *Foreman.*

Q. 56. Did either the porter, conductor or flagman know that the plaintiff and his mother were alighting from the train when the train started to pull out?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

Q. 57. Did either of them know that Carl Jones was trying to place the plaintiff back on the train after the train had started to pull out and until after the accident?
Answer. No.

JOHN Q. SPENCER, *Foreman.*

Endorsed: # 4054. Special findings, filed in District Court Oklahoma County, O. T. Dec. 6, 1904, B. D. Shear, Clerk, by Anne Hoover, Deputy.

326 I hereby certify the above to be true copies of the verdict and special interrogatories returned in case No. 4054, Samuel Calhoun *vs.* A. T. & S. F. R. R. Co.

Witness my hand and seal Dec. 7, 1904.

[SEAL.] B. D. SHEAR, *Clerk.*"

And thereupon the jury are discharged from the further consideration of this cause:

And thereupon the court proceeds to render judgment upon the verdict of the jury herein.

It is therefore on this 6th day of December, A. D. 1904, considered, ordered, and adjudged by the court upon the verdict of the jury aforesaid that the plaintiff, Samuel Calhoun, by Anna Calhoun, his next friend, do have and recover of and from the defendant, The Atchison, Topeka and Santa Fe Railway Company, the sum of ten thousand dollars ($10,000.00) together with the costs of this action, taxed at — dollars to which judgment of the court the defendant duly excepted and still excepts.

B. F. BURWELL, *Judge.*

OK.
B. D. S.

OK.
H. H. HOWARD.

Endorsed: No. 4054. Samuel Calhoun, by Anna Calhoun, his next friend, *v.* The Atchison, Topeka and Santa Fe Railway Company, Journal Entry, Dec. 6th, 1904. Filed in District Court Oklahoma County, O. T. Dec. 13, 1904. B. D. Shear, Clerk, by Will H. Clark, deputy.

327 And thereafter on the eighth day of December A. D. 1904, the defendant filed its motion to set aside certain answers to the special findings of the jury, which said motion is in words and figures as follows, to wit:

328 In the District Court of Oklahoma County, Oklahoma Territory.

No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Motion to Set Aside Certain Answers to Special Findings of the Jury.

And now comes the above named defendant and moves the court to set aside the answer of the jury to special question No. 12 submitted to the jury, for the reason that the answer to said question is not sustained by the evidence.

Also the defendant moves the court to set aside the answer of the jury to special question No. 14, submitted to the jury, for the reason that the answer to such special question is not sustained by the evidence.

Also defendant moves the court to set aside the answer of the jury to special question No. 39, submitted to the jury, for the reason that the answer to such special question is not sustained by the evidence.

Also the defendant moves the court to set aside the answer of the jury to special question No. 42, submitted to the jury, for the reason that the answer to said special question is not sustained by the evidence.

Also the defendant moves the court to set aside the answer of the jury to special question No. 44, submitted to the jury, for the reason that the answer to such special question is not sustained by the evidence.

HENRY E. ASP &
GEO. M. GREEN,
Attorneys for Defendant.

329 Endorsed No. 4054, District Court, Oklahoma County, Samuel Calhoun, by Anna Calhoun, his next friend *v.* The A. T. & S. F. Ry. Co. Motion to set aside certain answers to special findings of the jury. Filed in Dist. Court, Oklahoma County, O. T. Dec. 8, 1904, B. D. Shear, Clerk, by Will H. Clark, Deputy.

And thereafter and on the eighth day of December, A. D. 1904, the defendant filed its motion for judgment on the special findings of fact submitted to the jury, which said motion is in words and figures as follows, to wit:

330 In the District Court of Oklahoma County, Oklahoma Territory.

No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Motion for Judgment on Special Findings of Fact.

And now comes the above named defendant and moves the court to set aside the judgment of the court herein and to render judgment for the defendant herein upon the answers to special findings of fact submitted to the jury, the general verdict of the jury to the contrary notwithstanding; for the reason that the answers to said special findings of fact show that the plaintiff was not entitled to recover in this action as against the defendant.

HENRY E. ASP,
GEORGE M. GREEN,
Attorneys for Defendant.

Endorsed: No. 4054, District Court of Oklahoma County, Samuel Calhoun by Anna Calhoun, his next friend *v.* The A. T. & S. F. Ry. Co. Motion for judgment on special findings of fact. Filed in District Court Oklahoma County, O. T. Dec. 8, 1904, B. D. Shear, Clerk, By Will H. Clark, Deputy.

331 And thereafter and on the eighth day of December, A. D. 1904, the defendant filed its motion to set aside the judgment and for a new trial in this action, which said motion is in words and figures as follows, to wit:

332 In the District Court of Oklahoma County, Oklahoma Territory.

No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant.

Motion to Set Aside Judgment and for a New Trial.

And now comes the above named defendant and moves the court to set aside the judgment of the court herein, and the verdict of the jury, herein, and the special findings of fact of the jury herein,

and to grant to the defendant a new trial herein upon the grounds and for the reasons following, to wit:

First. Because of excessive damages appearing to be given under the influence of passion or prejudice.

Second. Because of error in the assessment of the amount of recovery, the same being too large.

Third. That the said verdict of the jury is not sustained by sufficient evidence.

Fourth. Because the verdict of the jury is contrary to the law.

Fifth. Because of errors of law occurring at the trial and excepted to by the defendant at the time.

Sixth. Because over the objections of the defendant the court admitted for the consideration of the jury certain incompetent, irrelevant and immaterial testimony and to which the defendant excepted at the time.

Seventh. Because the court refused to admit certain competent, relevant and material testimony offered by the defendant, and to which ruling of the court the defendant excepted at the time.

Eighth. Because the court erred in its instructions to the jury given as a whole, in that the said instructions were not separately stated or numbered, and to the giving of which instructions the defendant excepted at the time.

333 Ninth. Because the court misdirected the jury in material matters of law, and to which instructions of the court the defendant excepted at the time.

Tenth. Because the court erred in refusing to give to the jury the special instructions requested by the defendant numbered from one to nineteen inclusive, and to which refsual of the court the defendant excepted at the time.

Eleventh. Because the court erred in overruling the objection of defendant to the introduction of any evidence by the plaintiff at the beginning of the trial, to which ruling of the court the defendant excepted at the time.

Twelfth. Because the court erred in overruling the demurrer of the defendant to the evidence of the plaintiff at the close of plaintiff's evidence, and to which ruling of the court the defendant excepted at the time.

Thirteenth. Because the court erred in overruling the motion of defendant at the conclusion of the testimony for the court to instruct the jury to find a verdict for the defendant, and to which ruling of the court the defendant excepted at the time.

Fourteenth. Because the court erred in overruling the motion of the defendant to set aside the findings of the jury in answer to special questions of fact submitted by the court to the jury at the request of the defendant, numbered 12, 14, 39, 42, and 44, and to which ruling of the court the defendant excepted at the time.

Fifteenth. Because the court erred in overruling the motion of the defendant to set aside the judgment of the court and to render judgment in favor of defendant and against the plaintiff on the findings of the jury on special questions of fact submitted to the

jury by the court at the request of the defendant, and to which ruling of the court the defendant excepted to at the time.

334 HENRY E. ASP,
GEORGE M. GREEN,
Attorneys for Defendant.

Endorsed: No. 4054. District Court, Oklahoma County. Samuel Calhoun, by Anna Calhoun, his next friend, *v.* The A. T. & S. F. Ry. Co. Motion to set aside judgment and for a new trial. Filed in District Court Oklahoma County, O. T. Dec. 8, 1904. B. D. Shear, Clerk, by Will H. Clark, Deputy.

And thereafter and on the ninth day of December, A. D. 1904, the defendant filed its amended motion to set aside the judgment and for a new trial in this action, which said motion is in words and figures as follows, to wit:

335 In the District Court of Oklahoma County, Oklahoma Territory.

No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Amended Motion to Set Aside Judgment and for a New Trial.

And now comes the above named defendant and moves the court to set aside the judgment of the court herein, and the verdict of the jury herein, and the special findings of fact of the jury herein, and to grant to the defendant a new trial herein upon the grounds and for the reasons following, to wit:

First. Because of excessive damages appearing to be given under the influence of passion or prejudice.

Second. Because of error in the assessment of the amount of recovery the same being too large.

Third. That the said verdict of the jury and special findings are not sustained by sufficient evidence.

Fourth. Because the verdict of the jury and said special findings are contrary to the law.

Fifth. Because of errors of law occurring at the trial and excepted to by the defendant at the time.

Sixth. Because over the objection of the defendant the court admitted for the consideration of the jury certain incompetent, irrelevant and immaterial testimony and to which the defendant excepted at the time.

Seventh. Because the court refused to admit certain competent relevant and material testimony offered by the defendant, and to which ruling of the court the defendant excepted at the time.

336 Eighth. Because the court erred in its instructions to the jury given as a whole, in that the said instructions were not separately stated or numbered, and to the giving of which instructions the defendant excepted at the time.

Ninth. Because the court misdirected the jury in material matters of law, and to which instructions of the court the defendant excepted at the time.

Tenth. Because the court erred in refusing to give to the jury the special instructions requested by the defendant numbered from one to nineteen, inclusive, and to which refusal of the court the defendant excepted at the time.

Eleventh. Because the court erred in overruling the objection of the defendant to the introduction of any evidence by the plaintiff at the beginning of the trial, to which ruling of the court the defendant excepted at the time.

Twelfth. Because the court erred in overruling the demurrer of the defendant to the evidence of the plaintiff at the close of plaintiff's evidence, and to which ruling of the court the defendant excepted at the time.

Thirteenth. Because the court erred in overruling the motion of defendant at the conclusion of the testimony for the court to instruct the jury to find a verdict for the defendant, and to which ruling of the court the defendant excepted at the time.

Fourteenth. Because the court erred in overruling the motion of the defendant to set aside the findings of the jury in answer to special questions of fact submitted by the court to the jury at the request of the defendant, numbered 12, 14, 39, 42 and 44, and to which ruling of the court the defendant excepted at the time.

337 Fifteenth. Because the court erred in overruling the motion of the defendant to set aside the judgment of the court and to render judgment in favor of defendant and against the plaintiff on the findings of the jury on special questions of fact submitted to the jury by the court at the request of the defendant, and to which ruling of the court the defendant excepted at the time.

Sixteenth. Because the court erred in rendering judgment upon the verdict of the jury in favor of plaintiff and against the defendant, and to which the defendant excepted at the time.

HENRY E. ASP,
GEORGE M. GREEN,
Attorneys for Defendant.

Endorsed: No. 4054, District Court, Oklahoma County, Samuel Calhoun, by Anna Calhoun, his next friend, *v.* The A. T. & S. F. Ry. Co. Amended motion to set aside judgment and for a new trial. Filed in District Court, Oklahoma County, O. T. Dec. 9, 1904, B. D. Shear, Clerk, by Will H. Clark, Deputy.

338 And thereafter, and on the third day of August, A. D. 1905, the motion of defendant to set aside certain answers to special findings of the jury came on to be heard. And thereupon the court caused the entry to be made on the journal of said court

of the proceedings on said motion, which said entry on the journal of the court is in words and figures following to wit:

339 In the District Court of Oklahoma County, Oklahoma Territory.

No. 4054.

SAMUEL CALHOUN, by His Next Friend, ANNA CALHOUN, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Journal Entry.

Now on this 3rd day of August, A. D. 1905, the same being one of the judicial days of the March, A. D. 1905, term of this court, this cause comes regularly on for hearing, on motion of the defendant filed herein on the 8th day of December, A. D. 1904, to set aside certain answers to special findings of the jury returned herein with the general verdict of the jury, the said defendant appearing by Henry E. Asp, and George M. Green, its attorneys and the plaintiff Samuel Calhoun, by Anna Calhoun, his next friend, appearing by H. H. Howard, his attorney, and thereupon the said motion is argued to the court by counsel for defendant and plaintiff, and the court being sufficiently advised overrules said motion, to which ruling of the court the said defendant then and there duly excepted and still excepts.

B. F. BURWELL, *Judge.*

O. K.
HOWARD.

Endorsed: # 4054. Samuel Calhoun, by his next friend, Anna Cahoun *v.* The A. T. & S. F. Ry. Co. Journal Entry. Filed in District Court Oklahoma County, O. T. Aug. 5, 1905. B. D. Shear, Clerk by Will H. Clark, Deputy.

340 And thereafter and upon the 3rd day of August, 1905, the motion of defendant for judgment upon the special findings of fact returned by the jury, came on to be heard.

And thereupon the court caused an entry to be made of the proceedings on said motion, which said entry on the journal of the court is in words and figures following, to wit:

341 No. 4054.

SAMUEL CALHOUN, by His Next Friend, ANNA CALHOUN, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RY., Defendant.

Journal Entry.

Now on this 3rd day of August, A. D. 1905, the same being one of the judicial days of the March, A. D. 1905, term of this court, this cause comes regularly on for hearing, on the motion of the defendant herein for judgment in his favor and against the plaintiff herein upon the special findings of fact returned by the jury herein with their general verdict, and filed herein on the 6th day of December, A. D. 1904, the general verdict of the jury to the contrary notwithstanding, the plaintiff appearing by H. H. Howard his attorney, and the defendant appearing by Henry E. Asp and George M. Green, its attorneys, and thereupon the said motion is argued to the court by counsel of the plaintiff and defendant, and the court being sufficiently advised, overruled said motion to which ruling of the court in overruling the said motion of the defendant for judgment on the special findings of fact by the jury herein, the general verdict of the jury herein to the contrary notwithstanding, the said defendant duly excepted and still excepts.

B. F. BURWELL, *Judge.*

O. K.
HOWARD.

Endorsed: No. 4054. Samuel Calhoun by his next friend Anna Calhoun *v.* The A. T. & S. F. Ry. Co. Journal Entry. Filed in District Court Oklahoma County, O. T. B. D. Shear, Clerk by Will H. Clark, Deputy.

342 And thereafter and upon the 3rd day of August, 1905, the motion and amended motion of defendant to set aside the judgment of the court and the verdict of the jury and to grant a new trial, came on to be heard.

And thereupon the court caused an entry to be made on the journal of the court of the proceedings on said motions, which said entry on the journal of the court is in words and figures following, to wit:

343 No. 4054.

SAMUEL CALHOUN, by His Next Friend, ANNA CALHOUN, Plaintiff,
vs.
THE ATCHISON, TOPEKA & SANTA FE RY., Defendant.

Journal Entry.

And now on this 3rd day of August, A. D. 1905, the same being one of the judicial days of the March, A. D. 1905, term of this court,

this cause comes again on for hearing on the motion of the said defendant to set aside the judgment of the court herein and the verdict of the jury herein, and to grant the said defendant a new trial herein, filed in this cause on the 8th day of December, A. D. 1904, and upon the amended motion of said defendant to set aside the judgment of the court herein and the verdict of the jury herein and to grant to the said defendant a new trial herein, filed herein on the 9th day of December, 1904, the plaintiff appearing by H. H. Howard, his attorney and the defendant appearing by Henry E. Asp and George M. Green, its attorneys, and thereupon the said motion is argued to the court by counsel for plaintiff and defendant, and the court upon consideration of said motion and said amended motion and of the argument of counsel, being sufficiently advised, overrules said motion and said amended motion, to which ruling of the court the said defendant then and there duly excepted and still excepts, and thereupon the said defendant makes application to the court for an extension of time within which to make and serve and settle a case made in said action for review in the Supreme Court of the Territory of Oklahoma, and thereupon the court upon consideration of said application grants to the said defendant forty days from this date within which to make and serve case made for review in the Supreme Court of the Territory of Oklahoma, and grants to
344 the said plaintiff ten days after the time of such service, within which to suggest amendments thereto, the said case made to be settled and signed on five days notice by either party to the other.

B. F. BURWELL, *Judge.*

O. K.
HOWARD.

Endorsed: No. 4054. Samuel Calhoun by his next friend, Anna Calhoun, *v.* The A. T. & S. F. Ry. Co. Journal Entry. Filed in District Court, Oklahoma County, O. T. Aug. 5, 1905, B. D. Shear, Clerk by Will H. Clark, Deputy.

Filed Nov. 21, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

345 And thereafter and upon the ninth day of September, A. D. 1905, and upon the application of the defendant and for good cause shown the court extended the time in which to make and serve a case made;

And thereupon the court caused entry to be made on the journal of said court of the proceedings on said application, which said entry on the journal of the court is in words and figures as follows to wit:

346 No. 4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant.

Journal Entry.

And now on this 9th day of September, A. D. 1905, the same being one of the judicial days of the March, A. D. 1905, term of this court, this cause comes again on for hearing on the application of the said defendant for an extension of time to make and serve a case made, and extending the time as heretofore made by the order and judgment of this court on the 3rd day of August, 1905, the plaintiff appearing by H. H. Howard, his attorney, and the defendant appearing by Henry E. Asp, and Geo. M. Green, its attorneys; and

Thereupon, said application for an extension of time to make and serve a case made comes on for hearing and the court upon consideration of said application and for good cause shown grants said application.

It is therefore, considered, ordered, adjudged and decreed that the defendant, The Atchison, Topeka and Santa Fe Railway Company, have additional time in which to make and serve a case made for review in the Supreme Court of the Territory of Oklahoma, and extending the time as heretofore made by the order and judgment of this court on the 3rd day of August, 1905; and

Thereupon, the court upon consideration of said application grants the said defendant thirty five days from this date within which to make and serve a case made for review in the Supreme Court of the Territory of Oklahoma and grants to the said plaintiff ten days after the time of such service within which to suggest amendments thereto and said case made to be settled and signed on five
347 days' notice by either party to the other.

B. F. BURWELL, *Judge.*

Endorsed: #4054. Samuel Calhoun by his next friend, Anna Calhoun plaintiff, *vs.* The A. T. & S. F. Ry. Co. Defendant. Journal Entry. Sept. 9, 1905. Filed in District Court, Oklahoma County, O. T. — B. D. Shear, Clerk, by —— ——, Deputy.

Filed Nov. 21, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

348 And thereafter and on the 11th day of October A. D. 1905, and upon application of the defendant and for good cause shown, the court extended the time in which to make and serve a case made; and thereupon the court caused an entry to be made on the journal of said court of the proceedings on said application,

which said entry on the journal of the court is in words and figures following, to wit:

349 In the District Court of Oklahoma County, Oklahoma Territory.

4054.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

And now on this 11th day of October A. D. 1905, before the undersigned, the Judge of the District Court of Oklahoma County, Oklahoma Territory, at his chambers in Tecumseh, in Pottawatomie County, Oklahoma Territory, and within the Third Judicial District of the Territory of Oklahoma, the same being the judicial district in which the county of Oklahoma, in the Territory of Oklahoma is situated, this cause comes on for hearing on the application of said defendant for an extension of time within which to make and serve a case made and extending the time as heretofore made by the order and judgment of the District Court of said County of Oklahoma on the ninth day of September, 1905, the plaintiff not appearing and the said defendant appearing by Henry E. Asp, and Charles H. Woods, its attorneys; and

Thereupon, said application for an extension of time to make and serve a case made comes on for hearing and upon consideration of said application and for good cause shown the judge of said court finds that the said application should be granted.

It is therefore considered and ordered and adjudged by the Judge of the District Court of said Oklahoma County that the defendant The Atchison, Topeka and Santa Fe Railway Company, have additional time in which to make and serve a case made for review in the Supreme Court of the Territory of Oklahoma, and extend-
350 ing the time as heretofore made by the order and judgment of said court on the 9th day of September, 1905. And upon consideration of said application it is ordered by the said Judge of said Court that the said defendant, The Atchison, Topeka and Santa Fe Railway Company, be and it is hereby granted thirty days from this date within which to make and serve a case made for review in the Supreme Court of the Territory of Oklahoma, in the said above entitled action, and granted to said plaintiff ten days after the time of such service within which to suggest amendments thereto, the said case made to be settled and signed on five days' notice by either party to the other.

B. F. BURWELL,
Judge of the District Court of Oklahoma County, in the Territory.

Endorsed: 4054. Samuel Calhoun, by Anna Calhoun his next friend *vs.* The A. T. & S. F. R. R. Order extending time to make case made. Filed Oct. 11th, 1905, B. D. Shear, Clerk, by Will H. Clark, Deputy.

Filed Nov. 21, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

351 The foregoing case made contains and sets forth a full, complete, true and correct statement of all of the pleadings, processes, motions, demurrers, special questions, findings, orders, instructions asked and refused or given by the Court; all exceptions and all proceedings, orders, or judgments and all the evidence introduced or taken on the trial of said cause.

HENRY E. ASP,
GEO. M. GREEN,
Attorneys for Defendant.

TERRITORY OF OKLAHOMA, *County of Oklahoma, ss:*

We the undersigned attorneys of record of Samuel Calhoun by Anna Calhoun, his next friend, plaintiff in the above action, do hereby certify that the above and foregoing case made was duly served on us this 7 day of November, A. D. 1905.

H. H. HOWARD,
SAM HOOKER,
T. G. CHAMBERS,
R. M. CAMPBELL,
Attorneys for Defendant.

Filed Nov. 21, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

TERRITORY OF OKLAHOMA, *County of Logan, ss:*

We, the undersigned attorneys of record of Samuel Calhoun by Anna Calhoun, his next friend, plaintiff in the above action, do hereby certify that we have no suggestions of amendments to the above and foregoing case made and we hereby waive service of notice of settling and signing the same and agree that said case made may be settled and signed by the Honorable B. F. Burwell, the Judge of said Court, who tried said cause, at any time.

——— ———.

352 In the District Court of Oklahoma County, Oklahoma Territory.

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SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Plaintiff,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.

Notice of Presenting Case-Made for Settlement.

To H. H. Howard, T. G. Chambers, and Sam Hooker, attorneys of record for the above-named plaintiff:

You and each of you are hereby notified that the above named defendant will on Saturday, the 18th day of November, A. D. 1905, at the hour of nine o'clock, a. m., of said day or as soon thereafter as counsel can be heard, present to the Honorable B. F. Burwell, the judge of the district court of Oklahoma County, Oklahoma Territory, at the court house in the City of Oklahoma City, Oklahoma County, Oklahoma Territory, and the judge who tried the above entitled action, the case made served on you on the 7th day of November, A. D. 1905, for settlement and signing as the case made in the above entitled action.

HENRY E. ASP,
GEO. M. GREEN,
Attorneys for Defendant.

Filed Nov. 21, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Service of the above and foregoing notice is hereby acknowledged this 7th day of November, A. D. 1905.

SAM HOOKER,
Attorney for Plaintiff.

Filed Nov. 21, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

353 In the Supreme Court of the Territory of Oklahoma.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Suggestion of Amendments to Case-Made.

1. There are numerous clerical errors, among them, on page 64 months should be changed to minutes; on page 82, Guthrie should be changed to Edmond; on page 148, signature should be changed to signal; and in a number of places the testimony is made to show that express matter was unloaded at Edmond, *which* the evidence upon the trial showed only the loading of some baskets. It is agreed that if the word months appear any place in the transcript it may be changed to minutes.

HENRY E. ASP,
Att'y for Def't.

2. On page 14 it is made to appear that the court was requested to instruct the jury in writing and number the instructions; while this was done except as to numbering the instructions, I have no recollection of any such request; the record should be relied upon and unless such request is shown by the record, this should be cut out.

With these exceptions, the copy served being a true copy, I have no objections to settling the case made without notice.

November 17, 1905.

H. H. HOWARD,
Attorney for Defendant in Error.

Filed Nov. 21, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

354 TERRITORY OF OKLAHOMA, *County of Oklahoma, ss:*

This is to certify that the foregoing above case made and amendments thereto have been duly served in due time and the amendments thereto duly suggested and the same duly submitted to me for settlement and signing, as required by law, to the parties to said cause; that the same as above set forth, and as corrected by me is full, complete, true and correct, and contains a true statement of all the pleadings, processes, motions, demurrers, special questions, findings, orders, instructions asked and refused or given by the court; all exceptions and all proceedings orders or judgments and all the evidence introduced or taken on the trial of said cause; and

I hereby settle, allow, certify and sign the same as true and correct and hereby order that the clerk of the district court attest the same with the seal of said court and file the same of record as provided by law.

Witness my hand at Oklahoma City, this 18th day of November, A. D. 1905.

B. F. BURWELL,
Judge of said District Court.

Attest:
[SEAL.] B. D. SHEAR, *Clerk.*

Filed in the District Court of Oklahoma County, O. T. this 18th day of November, 1905.
[SEAL.] B. D. SHEAR, *Clerk.*

Filed Nov. 21, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

355 Case-made endorsed: #1833. In the Supreme Court of the Territory of Oklahoma. The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in error, *vs.* Samuel Calhoun, by Anna Calhoun, his next friend, Defendant in error. Petition in error and Case Made.

Filed Nov. 21, 1905.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

356 And thereafter, at the January, 1906, Term of said Supreme Court, on the Sixth day of January, 1906, the following proceeding was had in said cause, to wit:

#1833.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Ordered by the Court, that this cause be now continued as per stipulation, with leave to file briefs.

357 And thereafter, at the June, 1906, Term of said Supreme Court, on the Sixth day of June, 1906, the following proceeding was had in said cause, to wit:

#1833.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Now oral argument is waived herein and ten days allowed plaintiff in error for reply briefs. And cause is submitted on record and briefs.

358 And thereafter, at the January, 1907, Term of said Supreme Court, on the Thirteenth day of February, 1907, the following proceeding was had in said cause, to wit:

#1833.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

And now this cause comes on for final decision and determination by the Court upon the record and briefs submitted herein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the Court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Hainer, J. All the Justices concurring except Burwell, J., who presided in the court below, not sitting.

Which opinion reads in words and figures as follows, to wit:

359 No. 1833.

In the Supreme Court of the Territory of Oklahoma, January Term, 1907.

Filed February 13, 1907.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error,

vs.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error.

Syllabus.

1. In an action by an infant of tender years, in its own right, for personal injuries arising from negligence of a railway company, the fault or negligence of its mother or a third party, if any, contributing to such injury cannot be imputed to the child.

2. A common carrier of persons for hire or reward must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of care and skill. Among these duties which devolve upon a railway company are: (*a*) It is the duty of a railway company to announce the approach of a station where passengers are to disembark. (*b*) To afford passengers reasonable time and opportunity, under the circumstances, to embark and disembark. (*c*) To provide reasonable platform facilities for persons to disembark and embark with safety. (*d*) To keep the stations and platforms, at night, lighted in a reasonable manner. And (*e*) to keep the depot and platform free from dangerous obstructions.
3. In this case the evidence discloses that the railroad company was negligent in the following respects: (*a*) In failing to call or announce the station. (*b*) In failing to stop a reasonable length of time to permit passengers to disembark and embark. (*c*) In not lighting its platform. (*d*) In permitting a dangerous obstruction to remain upon the platform at a point where passengers ought to have been able to embark and disembark with reasonable safety. And (*e*) In permitting the train to leave the station without the exercise of reasonable care in observing whether passengers had safely disembarked and embarked. *Held:* That the injury sustained to the plaintiff in this case was not due to the independent wrongful act of a responsible human agency, but was solely due to the negligence of the railway company, and its servants and employés.
4. Where the instructions were reduced to writing, and clearly and concisely stated the law, the mere failure to number them did not constitute reversible error.
5. The evidence in this case examined and considered and held to be sufficient to sustain the general verdict and the special
360 findings of the jury.

Error from the District Court of Oklahoma County.

B. F. Burwell, Trial Judge.

Affirmed.

Henry E. Asp, Charles H. Woods, and George M. Green, for Plaintiff in error.

Henry H. Howard, for Defendant in error.

Statement of the Case.

This action was brought by Samuel Calhoun, an infant between two and three years old, by Anna Calhoun, his mother and next friend, to recover damages for personal injuries alleged to have been

sustained by reason of the negligence of the defendant railway company. The material averments in the petition were, substantially, that the plaintiff was a minor, of the age of three years. That on August 24, 1903, Anna Calhoun, the mother of Samuel Calhoun, purchased a ticket from the defendant railway company at Arkansas City, Kansas, for passage on a regular passenger train to Edmond, Oklahoma, paying the regular fare therefor. That after taking passage upon the train with her infant child, the conductor took up her ticket, and issued to her the usual check that is given to passengers, indicating the station which was her destination. That the plaintiff had never been over this line of road prior thereto. The train was late, and did not reach Edmond until about 11:30 o'clock that night. That the servants of the railway company had failed to call the station of Edmond as the train approached. That the plaintiff's mother received no warning that she had reached her destination. That the train stopped an unreasonably short time to permit passengers to disembark. That the platform was dark,
361 so dark that it was impossible to distinguish objects within a very short distance. That no assistance was given the plaintiff to disembark from the train. That while lamps were attached to the sides of the depot for the purpose of lighting the platform, they were not burning. "The plaintiff says further, that when said train arrived at said station, the night was very dark; that defendant had previously caused lamps to be placed at its depot, station and usual place of alighting at said station of Edmond; that said lights are necessary, usual and reasonable for the safety and accommodation of passengers alighting from trains in the night time; that the servants of defendant carelessly and negligently failed to light said lamps, and the same were not burning at the time said train arrived at said station; that because of such neglect, it was impossible for said passengers to see so as to know when said station was reached, or to see or distinguish persons or other objects at the place of alighting from said train; that the servants of defendant had placed and left a certain truck, belonging to the defendant and under its control, near to said train and the place of alighting therefrom at said station, in a careless and negligent position, and standing diagonal to said train, and which it was impossible to see, because of the darkness occasioned by the failure to light said lamps, and which was not in use or there for any lawful or necessary purpose, and which was there, and in such position at the time of the arrival of said train at said station. That after said train had arrived at said station of Edmond, and had stopped thereat, and with no information from the servants of the defendant, the said passengers learned the fact from other passengers thereon; that none of said servants came to offer or afford any assistance to said passengers in alighting from said train; that knowing of the duty of said servants to
362 give such assistance and relying upon the performance of said duty, and expecting them or some of them to appear at the exit from said train, for the purpose of rendering such assistance, the said passengers undertook to alight from said train; that at the

exit from said train, said Samuel Calhoun was taken from the train by one Carl Jones, and before said Anna Calhoun could alight from said train, the same was carelessly and negligently put in motion by the said servants of defendant; that said Jones was dressed in uniform and because of such darkness so occasioned, it was impossible to distinguish him from servants of defendant in charge of said train, who were likewise so dressed; that said Anna Calhoun believed said Jones to be one of said servants, and that he was taking said Samuel Calhoun, in pursuance of his duties as said servants and that while said train was moving she believed the same to be temporarily moving for a short distance, for some proper purpose in connection with the operation thereof and that the same would again soon stop to enable her to alight therefrom, because of which said facts she remained upon the platform or steps of one of the cars of said train while the same was in motion, and that said Jones for the civil purpose of avoiding the separation of her from her child carried said Samuel Calhoun along beside of said train, at and near the usual place of alighting therefrom; that while carrying said child and because of the darkness so occasioned by the carelessness and negligence of the defendant, in the failure of its servants to light said lamps and in leaving said truck so placed, which said Jones was unable to see by said darkness and came in contact therewith; that the violence occasioned by said contact compelled the said Jones to let go said child who because of his tender age and inability to protect himself was thereby thrown under said train, and the wheels of one of the cars thereof passed over his right foot and leg, severing the same, whereby the said foot and lower part of said leg was
363 wholly lost and destroyed, rendering the said Samuel Calhoun a permanent cripple, disabling him from physical and manual efforts and labor, occasioning a lay out of a large sum of money for surgeon's and doctors' fees, towit: two hundred dollars ($200.00), and permanently impairing his health and rendering him unable of earning a livelihood by the usual efforts of life, all to his damage in the sum of twenty five thousand ($25,000.00) dollars, and all of which was directly due to the negligence and carelessness of the defendant in the failure of its servants to take up said check, to announce the approach or arrival of said train and to advise said passengers thereof, and to assist them in alighting therefrom, and negligently and carelessly failing to light said lamps, and in carelessly and negligently placing said truck, and failing to assist said passengers to alight from said train and because of the dangerous condition of the said place of alighting, occasioned by the darkness and dangerous position of said truck, and the careless and negligent failure to stop said train at said station long enough to enable said passengers to alight therefrom in safety, and the careless and negligent starting of said train before said passengers had alighted.

The railway company filed an answer consisting, first, of a general denial, and, second, stating that the injuries which the plaintiff sustained, were due to the carelessness and negligence of the plaintiff's mother, and one Carl Jones, to whom the plaintiff had been

entrusted, and which negligence contributed directly to the injury complained of, and on account of which the plaintiff is not entitled to recover.

To this answer, the plaintiff filed a reply consisting of a general denial.

364 Upon the issues thus joined, the cause was submitted to a jury, and a verdict was returned in favor of the plaintiff, assessing his recovery at $10,000.00. The railway company submitted a number of special interrogatories to the jury, which were returned with the general verdict, and a motion was made to render judgment upon the special findings of the jury, notwithstanding the general verdict, which motion was overruled and exception saved. Thereupon the court approved the general verdict and entered judgment accordingly. Motion for new trial was duly filed, considered, and overruled, and exception noted, and the case is brought here for review, on petition in error and case made. Opinion of the Court by

HAINER, *J.*:

The first question presented is whether in a suit by an infant of the age of three years, by its next friend, and in its own right, for personal injuries, negligence of a parent or some third person can be imputed to the child, and thereby defeat a recovery. The authorities upon this question are not entirely harmonious, but by the great preponderance of the adjudged cases it is held that the negligence of a parent, guardian, or custodian is not imputable to the child, on the ground that it is not and cannot be, responsible for the danger for which it is exposed. That it has no volition in establishing the relation of privity with the person whose negligence it is sought to impute to it, and should not and cannot be charged with the negligence of such person in permitting it to be exposed to a danger which it has not the capacity either to know or understand, or to avoid in any manner whatever. This doctrine, it seems to us, is based upon solid reason, and is certainly in consonance with right and justice, and has been adopted in at least twenty two states and the District of Columbia. A collation of the authorities may be found on page 450 of volume 7 of the American and English Encyclopedia of law, second edition. This doctrine has been

365 adopted by the circuit court for the district of Indiana, in Berry *v.* Lake Erie, etc., R. Co., 70 Fed. Rep. 679; and by the United States Circuit Court of Appeals for the Eighth Circuit, in Chicago G. W. Ry. Co. *vs.* Kowalski, 92 Fed. Rep. 310. In the latter case Circuit Judge Thayer, after reviewing the authorities concludes as follows:

"We think that there is at the present time a decided preponderance of authority in favor of the doctrine that, in a suit brought by an infant in its own right for personal injuries, its parents' fault or negligence cannot be imputed to the child. In view of the general trend of the authorities, it is highly probable that this view will ultimately prevail in the courts of last resort, of all the states composing this circuit which have not already adopted it, and for that reason,

among others, we think that it should be sanctioned by this court. The judgment of the lower court is therefore affirmed."

The leading case in this country holding the contrary doctrine is Hartefield *vs.* Roper, 21 Wend., 615, decided in 1839, by the Supreme Court of New York, which doctrine, it seems, has been adhered to in that state.

The New York doctrine has been followed in Massachusetts in the case of Gibbons *v.* Williams, 135 Mass. 333; in Maine, in the case of Brown *v.* Railway Co. 58 Me., 384; in Minnesota, in Fitzgerald *v.* Railway Co., 39 Minn. 336; in California, in Meeks *v.* Railroad Co., 52 Cal. 602; and in Wisconsin, in Parish *v.* Town of Eden, 62 Wis. 272, 22 N. W. 399; and in a few other states.

The doctrine of Hartefield *v.* Roper was repudiated as early as 1850 by the Supreme Court of Vermont, in the case of Robinson *v.* Cone, 22 Vt. 213, in an able decision rendered by Judge Redfield.

366 In Newman *v.* Phillipsburg Horse-Car R. Co. 52 N. J. L. 446, 19 Atl. Rep. 1102, Chief Justice Beasley, in a learned opinion, criticises the doctrine announced in Hartefield *v.* Roper, as follows:

"In this case, in 21 Wend. 615, it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant. But this is a mere assumption, without legal basis; for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance when an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother, traveling with her child in her arms, should agree with a railway company, in case of an accident to such infant by reason of the joint negligence of herself and the company, the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds: First, the contract would be *contra bonos mores;* and second, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless the position has been deemed defensible that the same evil consequence to the infant will follow from the negligence of the mother, in the absence of such supposed contract, as would have resulted if such contract should have been made, and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself is deemed to be a pure
367 interpolation into the law; for, until the case under criticism, it was absolutely unknown, nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority, this doctrine is thus expressed: 'The common principle is that an infant, in all things which sound in his benefit, shall have favor and preferement in law as well as another man, but shall not be prejudiced by anything to his disadvantage.' 9 Vin. Abr. 374.

And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself, and his custodian, into an agency to which the harsh rule of *respondeat superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper, all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control nor remove him; and the injustice, therefore, of making the latter responsible in any measure whatever for the torts of the former would seem to be quite evident. Such, subjectively, would be hostile in every respect to the natural rights of the infant, and consequently cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection."

In Berry *v.* Lake Erie & W. R. Co., *supra*, District Judge Baker, speaking for the court, said:

"The doctrine which imputes to an infant *non sui juris*, the negligence of its parent or guardian, seems to be unsound in principle, and is not supported by the weight of authority. 368

It is yielding to the more enlightened and humane rule which denies the doctrine of imputed negligence in relation to infants incapable of exercising care for their own safety."

My conclusion, then, on this branch of the case is that the trial court properly held that the negligence, if any, of the mother or of Carl Jones, could not be imputed to the infant child.

But it is earnestly contended by the railway company that the injuries complained of were due solely to the independent wrongful act of a responsible human agency, to wit, the act of Carl Jones, whose negligence was the direct and proximate cause of the injury, and whose negligence could not have been reasonably anticipated by the railway company, or its servants. This doctrine is clearly stated by Mr. Ray in his work on Negligence of Imposed Duties, Passenger Carriers, page 669, where it is stated:

"But where the concurrent cause is the independent, wrongful act of a responsible person, such act arrests action, being regarded as the proximate cause of the injury, the original negligence being considered as its remote cause. As in the law it is the proximate and not the remote cause, which is regarded, he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury."

And the same doctrine is fully and clearly discussed in the brief of counsel for plaintiff in error.

Perhaps one of the best considered cases is the case of Missouri Pac. Ry. Co. *v.* Columbia, 69 Pac. Rep. 338, in which Justice Pollock, speaking of the Supreme Court of Kansas, discusses this question in an elaborate opinion, and in which case the facts may be briefly stated as follows:

369 "C. D. Columbia, a locomotive fireman in the employ of the Missouri Pacific Railway Company, was killed by the derailment of his engine at the station of Langley, on said road. His widow, Jennie V. Columbia, in her own behalf and in behalf of her minor children, brought this action to recover damages on account of negligence of the company resulting in his death. The acts of negligence charged are: First, that the company negligently permitted several heavy grain doors to be piled and remain upon a raised platform at the west end of its depot, at the station of Langley, near the track upon which the engine which Columbia was firing, was scheduled to pass on, the night of May 9, 1899, and said heavy grain doors, being there so negligently placed, were blown off, falling upon the track, derailing the engine, causing the death; second, that it was the duty of the company to provide a reasonably safe and clear track over which said engine should run, and in disregard of its duty in this respect, the company negligently permitted said heavy grain doors to remain upon the track after being blown there by the wind, thus obstructing the track, rendering it unsafe for use, the result of which negligence, caused the death of Columbia."

It will thus be seen that the direct and proximate cause of the injury in that case was a severe gale, for which the railroad company was in no manner responsible, and hence the court properly held that:

"In a case where two distinct, successive causes, wholly unrelated in operation, contribute toward the production of an accident resulting in injury and damage, one of such causes must be the proximate and the other the remote cause of the injury.

A prior and remote cause cannot be made the basis of an action for the recovery of damages if such remote cause did nothing
370 more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury."

But the facts in the case under consideration, are clearly distinguishable from the facts in the Kansas case. In this case the direct and proximate cause of the injury was directly attributable to the truck, which the servants of the railway company negligently permitted to remain upon the platform, which was dark, in fact so dark that an obstruction could not be observed by the exercise of reasonable care. Had the platform been free from obstruction, or had it been lighted so that passengers could have observed the obstruction by the exercise of reasonable care, we think the accident would have been avoided.

In Chicago, R. I. & P. Ry. Co. *v.* Stibbs, 87 Pac. Rep., 293, this court laid down the rule that:

"A common carrier of persons for hire or reward must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

What are some of these duties which devolve upon a railroad

company? (1) It is the duty of a railway company to notify or warn passengers of the approach of a station where passengers are to disembark. (2) To afford passengers reasonable time and opportunity, under the circumstances, to embark and disembark. (3) To provide reasonable platform facilities for persons to disembark with safety. (4) To keep the station and platform lighted in a reasonable manner. (5) To keep the depot and platform free from dangerous obstructions.

371 In what respect does the evidence show that the railway company was negligent in this case? While the evidence was conflicting, it appears from the weight of the testimony that the servants of the railway company failed to announce the station as the train approached Edmond. Second, that the train did not stop a reasonable time to permit passengers to disembark. Third, that the depot platform was dark. Fourth, that the lamps at the station platform were not lighted. Fifth, that the servants of the railway company had left the truck belonging to the defendant company and under its control near to the train and the place of alighting therefrom at said station, and in such a position that it was impossible to observe it, on account of the darkness of the night and the darkness of the platform, by the exercise of reasonable care. In all these respects it appears from the clear weight of the testimony that the railway company and its servants were guilty of negligence. Hence we think that the facts in this case are clearly distinguishable from the facts of the cases cited by counsel for plaintiff in error. We have examined the authorities cited in the brief, and have no serious criticism to make in regard to the general principle of law announced therein, but believe that the facts in those cases are clearly distinguishable from the facts in the case now under consideration. The law of direct and proximate cause of injury seems to be well settled by the authorities, but the difficulty the courts have is in applying the law to the facts of each particular case.

In Insurance Company *v.* Tweed, 74 U. S., 44-52, Mr. Justice Miller, is discussing this question, uses the following language:

"If we could deduce from them the best possible expression of the rule, it would remain after all, to decide each case largely
372 upon the special facts belonging to it, and often upon the very nicest discriminations.

One of the most valuable of the *criteria* furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

In the present case there were a number of negligent acts by the railway company. It was negligent in not announcing the station; it was negligent in failing to stop a reasonable length of time at the station to permit the plaintiff to disembark; it was negligent in permitting its platform to be practically in total darkness; it was negligent in permitting a dangerous obstruction to remain upon the dark platform, at a point where passengers expected to embark and disembark with reasonable safety; and finally, it was negligent in per-

mitting the train to leave the station without the exercise of reasonable care in observing whether passengers had safely embarked and disembarked. It is impossible to carefully read and scrutinize the entire record without reaching the conclusion that the conductor and his crew where guilty of culpable negligence, and that by the exercise of such reasonable care and caution as a prudent person ought to exercise under the circumstances of this case, the railway company could have avoided the severe consequences of this case. This disposes of two main propositions involved in the case, and now we will briefly consider the specific errors assigned and argued in the brief.

It is argued that the court erred in failing to separately state and number his instructions to the jury, and erred in not prop-
373 erly stating the law of the case in such instructions, and in refusing instructions requested by the defendant. At the conclusion of the testimony, the court instructed the jury in writing, but it seems that by some inadvertence the instructions were not numbered. While our statute requires the instructions to be reduced to writing and numbered, when requested by either party, the mere failure to number each instruction separately, in our opinion, is not sufficient to constitute reversible error. The instructions in this case were reduced to writing, and each proposition of law involved in the case is clearly and concisely stated, and, an exception was allowed to each and every part of the charge and the rights of the railway company were fully protected, and in our opinion, the instructions were as favorable to the railway company as the facts in this case would justify. Hence, we are unable to perceive how the mere failure to number the instructions could constitute prejudicial error. And, in our opinion, there was no error in refusing the instructions requested by the railway company, because the general charge of the court sufficiently covered the entire law of the case.

It is next assigned and argued that the court erred in overruling the motion of the defendant to set aside the findings of the jury made in answer to question- 12, 14, 39, 42 and 44, the same not being supported by sufficient evidence.

The jury, in answer to question 12, found that the station at Edmond was not called. Mrs. Calhoun testified positively that the station was not called, and her testimony was corroborated, in effect, by several other passengers, who testified that they did not hear the station called. On the other hand, the porter testified that he called the station. Upon this point the evidence is conflicting, and
374 therefore, under the well-settled rules of practice, this court will not disturb such finding.

In response to question 14 the jury found that the train stopped at Edmond for only one minute. There is evidence to sustain this finding. The witness M. Fulton, testified, on page 46 of the record, on re-direct examination that "it wasn't a minute." And the witness E. S. Vaught, on page 48 of the record, testified, in answer to a question put to him: "Have you any idea as to how long it remained? A. Well, I should say not more than a minute; perhaps

a little longer than that." It appears from all the testimony and all the circumstances that the train stopped but a very short time, the testimony as to the time ranging from one to three minutes. Hence, there was evidence in the record showing that the jury were justified in finding that the train did not stop longer than one minute. And the overwhelming weight of the testimony shows that the platform was dark, in fact, very dark, and that the truck was at a point where the passengers had a right to believe the platform was free from obstructions, and where they had a right to embark and disembark from the train at that station.

The third and last assignment of error relates to the overruling of the defendant's demurrer to the evidence the refusal to give the peremptory instruction offered by the defendant, in overruling the motion for judgment on the findings of the jury, and the overruling of the motion for a new trial. This assignment of error goes directly to the merits of the cause, and, as heretofore stated, we are of the opinion that the court was fully justified in submitting the question of negligence to the jury under proper instructions, and that
375 the court would have committed reversible error had the case been taken from the jury.

Upon a careful consideration of the entire case, we are of the opinion that no error was committed by the trial court which would justify a reversal of the cause. The judgment of the court below is therefore affirmed.

Burwell, J., who presided in the court below, not sitting; all the other Justices concurring.

376 UNITED STATES OF AMERICA,
Territory of Oklahoma, ss:

I, Benjamin F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma do hereby certify that the foregoing 375 pages numbered from 1 to 375 inclusive, are a true and complete transcript of the record and all proceedings in said Supreme Court in the case of The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, *versus* Samuel Calhoun by Anna Calhoun, his next friend, defendant in error, as the same remain upon the files and records of said Supreme Court.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court at the City of Guthrie this 11th day of April, A. D. 1907.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 20,689. Oklahoma Territory supreme court. Term No. 297. The Atchison, Topeka & Santa Fe Railway Company, plaintiff in error and appellant, *vs.* Samuel Calhoun, by Anna Calhoun, his next friend. Filed May 2d, 1907. File No. 20,689.

Office Supreme Court, U. S.
FILED
SEP 13 1907
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

October Term 1907.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff in Error and Appellant,

vs.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, Defendant in Error and Appellee.

No. 71.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

HENRY E. ASP,
CHARLES H. WOODS,
GEO. M. GREEN,
Attorneys for Plaintiff in error.

IN THE

Supreme Court of the United States

October Term 1907.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error and Appellant,

vs.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend,
Defendant in Error and Appellee.

No. 297.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The defendant in error and appellee on September 25, 1903, filed in the District Court of Oklahoma County his petition. (Printed record pages 33 to 36, inclusive).

The petition substantially alleges:

That on August 24, 1903, Anna Calhoun, mother of Samuel Calhoun, purchased a ticket at Arkansas City, Kansas, to Edmond, Oklahoma, and took passage on regular passenger train of the evening of said day, the said Samuel Calhoun being an infant three years of age.

That on the approach of said train at Edmond on which Mrs. Calhoun and Samuel were riding, the servants of the company negligently failed to announce the station of Edmond and negligently failed to warn the said Anna Calhoun that the said train was approaching Edmond, and failed to assist the said Anna Calhoun and Samuel Calhoun to alight from said train.

That the night was very dark, and that the servants of defendant carelessly and negligently failed to light the lamps at the station at the place of alighting from said train, and that the servants of defendant had placed and left a certain truck belonging to defendant and under its control near the said train and the place of alighting therefrom at said station, in a careless and negligent position, and which truck was not in use or there for any lawful or necessary purpose.

That when said train arrived at Edmond the said Anna Calhoun learned the fact from other passengers on the said train, and that none of the servants of said defendant came to afford or offer any assistance to herself and the said Samuel in alighting from said train.

That the said Anna Calhoun and the said Samuel Calhoun undertook to alight from said train, and at the exit from said train said Samuel Calhoun was taken from the train by one Carl Jones, and before said Anna Calhoun could alight from said train the same was carelessly and negligently put in motion by the said servants of defendant; that she believed said train to be temporarily moving for a short distance, for some proper purpose in connection with the operation thereof, and that the same would again soon stop to enable her to alight therefrom; that because of which she remained upon the platform or steps of one of the cars of said train while the same was in motion, and that said Jones, for the civil purpose of avoiding the separation of herself from her child, carried said Samuel Calhoun along the side of said train at

and near the usual place of alighting therefrom; that while carrying said child and because of the darkness so occasioned by the carelessness and negligence of the defendant in the failure of its servants to light said lamps and in leaving said truck so placed, which said Jones was unable to see by said darkness and came in contact therewith, that the violence occasioned by said contact compelled said Jones to let go of said child, who, because of his tender age and inability to protect himself, was thereby thrown under said train, and the wheels of one of the cars thereof passed over his right foot and leg, severing the same, whereby the said foot and lower part of said leg were wholly lost and destroyed, rendering the said Samuel Calhoun a permanent cripple, and demanding judgment for twenty-five thousand dollars ($25,000).

To this petition the plaintiff in error, defendant in the trial court, filed its answer (printed record pages 38 and 39) which answer was first, a general denial, and for a second defense pleaded the facts as follows:

2nd. For a second and further defense, this defendant alleges and avers the fact to be that on the night of the 24th day of August, 1903, the plaintiff was traveling on one of this defendant's passenger trains in charge of his mother, Anna Calhoun, plaintiff, being then and there a child of tender years, and destined for the Town of Edmond in Oklahoma County; that before the arrival of said train of this defendant at said Town of Edmond, this defendant by its agents and servants, in charge of said train, duly announced the approach of said train to Edmond in a coach in which the said plaintiff in charge of Anna Calhoun, his mother, was riding so that all the passengers riding in said coach could have known and did know of the approach of said train to the station of Edmond, that said train was approaching said station and would stop at such station so that all passengers destined to Edmond could leave the train; that nothwithstanding such announce-

ment the plaintiff's mother, who then and there had charge of the plaintiff, failed to make any preparation to leave such train until after it had stopped at the station of Edmond a sufficient time for her to have alighted from said train and until about the time said train was ready to leave said station of Edmond; the said Anna Calhoun thereupon gave the plaintiff, Samuel Calhoun, to a stranger, Carl Jones, who agreed to take the plaintiff off of the train in safety and the plaintiff's mother, Anna Calhoun, had plenty of time to alight from said train in safety but failed to do so and after said train was in motion she went to the steps of said train and called to said Carl Jones to bring the plaintiff, Samuel Calhoun to her, notwithstanding the fact that it was night time, and she insisted on such stranger running to such moving train with said Samuel Calhoun in his arms, and the said stranger was looking at said Anna Calhoun, and trying to run with the said child to catch said train and was not looking where he was walking with any regard for his safety or that of said child; that said truck over which said stranger stumbled with plaintiff, Samuel Calhoun, was on the south part of this defendant's platform; was not at a point where passenger coaches would stop to take off passengers from the train in question and was not at a point where said passenger train did stop for passengers, and said truck had been taken there only a few moments before by an agent of this defendant for the purpose of loading baggage on said train, which was a necessary part of this defendant's work and had not been in such position to exceed ten minutes and was standing on said passenger platform for the purpose of loading said baggage on the train and the said Carl Jones in charge of the plaintiff could have seen said baggage truck had he exercised any care whatever and had he not been running with said child in his arms at the command of plaintiff's mother, and looking at the said Anna Calhoun standing on the steps of this defendant's train while so running. On which account

if the said plaintiff was injured as alleged in said petition, said injury was the result of the carelessness and reckless misconduct of the said Anna Calhoun and of the said Carl Jones to whom the plaintiff had been entrusted, which contributed directly to the injury complained of and on which account the plaintiff cannot recover herein.

The facts as developed from the proof are that on the night in question Mrs. Calhoun purchased a ticket at Arkansas City, Kansas, and with her son, Samuel, took passage on the regular passenger train for Edmond. The testimony is conflicting as to whether the station of Edmond was called, that is some witnesses testify that they did not hear the station called but six witnesses swear positively they heard it called. The car in which Mrs. Calhoun was riding was a regular coach, lighted with Pintsch gas, and the lights in the coach were burning brightly. There were six (6) sets of these lights inside of the coach, one additional set of the lights in each end in the vestibule, and another set of the lights on each platform of the coach, lighting the steps and platform at each end of the car; ten sets of lights in the car, vestibule and platform.

The jury found that the train stopped at Edmond one minute

After the train had been standing some time Mrs. Calhoun inquired of the passengers what station this was and they told her it was Edmond, and she started to the door with Samuel to alight from the train.

The following findings in response to special questions were made by the jury. (Printed record pages 227 to 231, inclusive.)

> "Q. 18. When plaintiff and his mother reached the platform of the car on which they were riding was the train then moving out of Edmond station?
>
> "Answer. Yes.

"Q. 19. When plaintiff reached the platform of said car did his mother hand him to a bystander?

"Answer. She did.

"Q. 20. To whom did the mother of plaintiff hand the plaintiff?

"Answer. W. W. Robertson.

"Q. 21. If you say she handed the plaintiff to W. W. Robertson, to whose care did the said Robertson confide the plaintiff?

"Answer. Walter Melville Robertson.

"Q. 22. If you say that W. W. Robertson placed the plaintiff in the care of Walter Melville Robertson, was the said Walter Melville Robertson the son of W. W. Robertson?

"Answer. Yes.

"Q. 23. What instructions did W. W. Robertson give to his son, Walter Melville Robertson, when he placed the plaintiff, Samuel Calhoun, in his care?

"Answer. Keep him.

"Q. 24. Was W. W. Robertson an employee of defendant?

"Answer. No.

"Q. 25. Was the said Walter Melville Robertson, to whom W. W. Robertson confided the care of plaintiff, Samuel Calhoun, after receiving him from his mother, an employee of the defendant?

"Answer. No.

"Q. 26. Was the plaintiff, Samuel Calhoun, injured while alighting from the train on which his mother took passage with him from Arkansas City, Kansas, to Edmond, Oklahoma?

"Answer. He was not.

"Q. 27. Did Anna Calhoun, plaintiff's mother, alight from said train before the accident?

"Answer. No.

"Q. 28. Was the said train in motion leaving Edmond when the plaintiff, Samuel Calhoun, was taken off the train by W. W. Robertson?

"Answer. Yes.

"Q. 29. At the time plaintiff, Samuel Calhoun, was taken off the train by W. W. Robertson, was the

train moving too fast for plaintiff's mother safely to alight?

"Answer. Yes.

"Q. 30. Did the plaintiff's mother, Anna Calhoun, remain on the train after the plaintiff, Samuel Calhoun, was taken off by W. W. Robertson, because she thought the train was running too fast for her to alight with safety?

"Answer. Yes.

* * * * * * * *

"Q. 32. To whom did Walter Melville Robertson give the custody of the plaintiff, Samuel Calhoun?

"Answer. To Carl Jones, thinking he was a railroad employee.

"Q. 33. If in answer to the last question you say that Walter Melville Robertson gave the custody of the plaintiff to Carl Jones, please say if the said Carl Jones was an employee of the defendant railway company?

"Answer. No.

"Q. 34. Did Carl Jones run along the side of the car to try to put the plaintiff, Samuel Calhoun, on the train?

"Answer. Yes.

"Q. 35. If you answer the last question yes, how fast was the train going at the time?

"Answer. Four to eight miles an hour.

"Q. 36. Was the train running at that time too fast for a passenger to alight from or board the train with safety?

"Answer. Yes.

"Q. 37. Did Carl Jones, in trying to place plaintiff, Samuel Calhoun on the train, run against the baggage truck on the platform of defendant at said station of Edmond?

"Answer. Yes.

"Q. 38. How far was it from the place where Carl Jones received the plaintiff, Samuel Calhoun, from Walter Melville Robertson to the place where he ran against the said truck?

"Answer. Seventy-five to one hundred feet."

* * * * * *

"Q. 40. How far from the south end of the coach in which plaintiff and his mother were riding when the train stopped for the station of Edmond to the place where the said baggage truck was left on the platform?

"Answer. Seventy-five to one hundred feet.

"Q. 41. Was the coach in which plaintiff and his mother were riding from Arkansas City to Edmond lighted?

"Answer. Yes.

* * * * * * *

"Q. 47. Who was the conductor in charge of said train?

"Answer. Jackson.

"Q. 48. Where was the conductor at the time plaintiff's mother gave said plaintiff to W. W. Robertson?

"Answer. On the south end of the smoker.

"Q. 49. Where was the conductor when Carl Jones was running alongside of the train and trying to put the plaintiff on the train?

"Answer. On the smoker.

"Q. 50. Who was the porter on said train?

"Answer. Kenedy, colored.

"Q. 51. Where was the porter when plaintiff's mother handed plaintiff to W. W. Robertson?

"Answer. Blind baggage.

"Q. 52. Where was the porter when Carl Jones was running alongside of the train trying to put the plaintiff on the train?

"Answer. Blind baggage.

"Q. 53. Who was the flagman on the train?

"Answer. Benfer.

"Q. 54. Where was Flagman Benfer when the plaintiff was taken off of the train by W. W. Robertson?

"Answer. On north end of sleeper.

"Q. 55. Where was Flagman Benfer when Carl

Jones was running alongside of the train trying to put plaintiff on the train?

"Answer. On the north end of sleeper.

"Q. 56. Did either the porter, conductor, or flagman know that the plaintiff and his mother were alighting from the train when train started to pull out?

"Answer. No.

"Q. 57. Did either of them know that Carl Jones was trying to place the plaintiff back on the train after the train had started to pull out and until after the accident?

"Answer. No."

The evidence is undisputed that the cars were all lighted, the car in which the plaintiff and his mother were riding was brightly lighted, and that the lights shone out on the platform. (The evidence is set forth in printed record pages 46 to 205, inclusive.)

The testimony all shows that there was a lamp in the bay window of the depot, the light from which shone out in all directions on the platform through the window. The testimony all shows that the south end of the coach on which plaintiff and his mother were riding and from which they attempted to alight was stopped just opposite this bay-window. The undisputed testimony shows the truck against which Carl Jones ran was left on the platform opposite the baggage car where it had been used for loading and unloading baggage, and was more than one hundred feet from the south end of the coach from which the plaintiff and his mother attempted to alight.

The evidence and findings show that plaintiff was handed to W. W. Robertson by his mother who placed plaintiff on the platform several feet from the train in care of his son, Walter Melville Robertson and told him to keep the plaintiff; that at the time Mrs. Calhoun handed the plaintiff to W. W. Robertson the train was in motion and she did not alight, be-

cause the train was going too fast for her to alight with safety. Walter Melville Robertson gave the child to Carl Jones, who was not an employee of the defendant; and who ran alongside of the train at least one hundred feet, the train increasing in speed all the time, until he struck against the truck, and dropped the plaintiff under the train; that none of the employees of the defendant knew that he was attempting to place the child back on the train.

At the commencement of the trial, and before the introduction of any evidence (printed record page 40) the defendant requested the court to instruct the jury as follows:

> "And thereupon and at the beginning of the trial, the defendant requested the court to instruct the jury in writing and to separately state and number his instructions as provided by the statute."

And again, at page 224 of the printed record, appears the following objection and exception to the instructions of the court:

> "Be it futher remembered that at the time the court instructed the jury as aforesaid and before such instructions were read to the jury, the defendant objects and excepts to the same as a whole, because such instructions are not separately stated and numbered as requested and as required by statute and because such instructions are conflicting and misleading and do not correctly state the law of the case."

At the trial of the case defendant also specifically objected and excepted to the instructions given. (For instructions given see printed record pages 219 to 223, inclusive, and for exceptions see printed record page 224.)

Defendant also at the trial submitted to the court in writing nineteen separate specific requests for instructions which were each refused by the court and excepted to by the defendant. (Printed record pages 212 to 218, inclusive.)

At the conclusion of the evidence in behalf of the plain-

tiff at the trial the defendant filed its demurrer in writing which was overruled by the court and proper exceptions taken. (Printed record page 144.)

The defendant also filed in the trial court its motion and amended motion for a new trial (printed record pages 240 to 243, inclusive), which was overruled by the court and exceptions duly taken. (See printed record pages 245 and 246.)

The plaintiff in error and appellant prosecuted a petition in error to the supreme court of the Territory of Oklahoma from said judgment. The case was submitted to the supreme court at the June term, 1906, and at the January term, 1907, to-wit on February 13, 1907, the supreme court of the Territory affirmed the judgment of the district court and the following proceedings were had, and written opinion filed. (See printed record pages 252 to 263, inclusive.)

The plaintiff in error and appellant brings the case here to this court and makes in this court thirty assignments of error. (Printed record page 5 to page 23, inclusive.)

The plaintiff in error in this court, for a reversal of the judgment of the supreme court of the Territory of Oklahoma, and of the trial court, relies upon the following:

SPECIFICATIONS OF ERROR.

SPECIFICATION No. 1.

Assignment of Error No. 2. (Printed record page 6.)

> "The Supreme Court erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in overruling the demurrer of the plaintiff in error at the close of the evidence of the plaintiff below, which demurrer was upon the ground and for the reason that the evidence introduced by

the plaintiff below was not sufficient and did not prove or tend to prove a cause of action in favor of the said plaintiff and against the defendant."
(Printed Record page 144.)

SPECIFICATION No. 2.

Assignment of Error No. 3. (Printed record page 6.)

"3. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in overruling the motion and request of the plaintiff in error at the conclusion of the evidence, to instruct the jury to find a verdict for the defendant below, which motion and request of said defendant were upon the ground and for the reason that the plaintiff below failed to prove a cause of action in favor of the plaintiff and against the defendant." (Printed Record pages 212 and 243.)

SPECIFICATION No. 3.

Assignment of Error No. 4. (Printed record page 6.)

"4. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in failing to separately state and number his instructions to the jury as requested by the defendant below, which said request of defendant below is found in original record at page 14 thereof, and the exceptions to the said instructions as a whole as given by the court for the reason that they were not separately stated and numbered and paragraphed being found at pages 242 and 243 of the said record; which said instructions as a whole, numbered and paragraphed and in the manner in which they were given to the jury herewith follow in full as a part of this assignment of error."

(For the instructions complained of by this assignment of error see instructions printed record pages 6 to 11, inclusive; also printed record pages 219 to 223, inclusive. For

exceptions to general instructions see printed record page 224; for request to separately state and number, see printed record page 40.)

SPECIFICATION No. 4.

Assignment of Error No. 5. (Printed record page 11.)

"5. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number One, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

INSTRUCTION No. 1.

"Requested by Defendant.

"You are instructed that the plaintiff in this case has failed to prove a cause of action in favor of the plaintiff and against the defendant. You will, therefore, find for the defendant.

"Refused and excepted to by the defendant.

"B. F. BURWELL, *Judge.*"

(Printed Record pages 212 and 243.)

SPECIFICATION No. 5.

Assignment of Error No. 6. (Printed record page 11.)

"6. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number Four, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 4.

"Requested by Defendant.

"You are instructed that the undisputed evidence in this case shows that the plaintiff successfully alighted from the train on which he was a passenger with his mother without injury and that so far as plaintiff was concerned the contract of carriage between the plaintiff and defendant was successfully completed, and if the plaintiff was injured while attempting to board the train you will find for the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

(Printed Record page 212.)

SPECIFICATION No. 6.

Assignment of Error No. 7. (Printed record page 12.)

"7. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number Five requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 5.

"Requested by Defendant.

"If you find from the evidence that the defendant failed to call the station and failed to properly light the station platform, and further find from the evidence that the plaintiff was alighted from said train without injury to himself the negligence of the defendant in failing to call the station or properly light the platform cannot be said to have been a violation of its contract of carriage or the proximate cause of the injury, and will find for the defendant.

"Refused and excepted to by the defendant.

"B. F. BURWELL, *Judge.*"

(Printed Record page 213.)

SPECIFICATION No. 7.

Assignment of Error No. 8. (Printed record page 12.)

"8. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number Six, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 6.

"Requested by Defendant.

"If you find from the evidence that the defendant failed to announce the station, and further find that the defendant's train did not stop at the station long enough to enable plaintiff and his mother to alight therefrom, and you further find that when plaintiff and his mother reached the platform for the purpose of alighting that the train was in motion and that the platform was dark and the plaintiff and his mother could not see, the plaintiff or the mother of plaintiff would not be justified in handing the plaintiff off the train or in attempting to have the plaintiff placed back on the train while the same was in motion, and you will find for the defendant.

"Refused and excepted to by the defendant.

"B. F. BURWELL, *Judge.*"

(Printed Record page 213.)

SPECIFICATION No. 8.

Assignment of Error No. 9. (Printed record page 13.)

"9. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case Instruction Number Eight, requested by defendant below; which said instruction

so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 8.

"Requested by Defendant.

"A railroad company, while it is bound to give a passenger a reasonable time and a reasonably safe place to alight, is not bound to assist its passengers in entering or leaving its cars. Such assistance cannot be claimed as a matter of right, unless the passenger is sick, infirm, blind or aged, and known to the railroad company to be such. The evidence in this case does not show that the plaintiff or his mother would come under the above exceptions.

"Refused and excepted to by the defendant.

"B. F. BURWELL, *Judge.*"

(Printed Record page 214.)

SPECIFICATION No. 9.

Assignment of Error No. 10. (Printed record page 13.)

"10. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number Ten, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 10.

"Requested by Defendant.

"You are instructed that the fact of an accident or an injury having taken place in which plaintiff was hurt raises no presumption of negligence on the part of the defendant.

"Refused and excepted to by the defendant.

"B. F. BURWELL, *Judge.*"

(Printed record page 214.)

SPECIFICATION No. 10.

Assignment of Error No. 11. (Printed record pages 13 and 14.)

"11. The supreme court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Eleven, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 11.

"*Requested by Defendant.*

"You are further instructed that if you find from the evidence that the defendant failed to announce the station of Edmond and further find from the evidence that the defendant stopped the train at said station a reasonable time for passengers to get off and on the train and that the said train was stopped at a place where a suitable platform was provided for entering and leaving the train, and you find further from the evidence that the said train had a baggage car and carried the baggage of its passengers and that the defendant had a truck on the platform at the said baggage car which said truck as left on the platform at a place where passengers were not required to enter or leave the train, you are instructed that the leaving of such truck upon the platform at said place, not intended or necessary for the use of passengers in alighting from or entering the train, such action on the part of the defendant was not negligence, and if you find from the evidence that after plaintiff had alighted from the train his mother requested the bystanders to put him back on the train, the train then being in motion, and a stranger not in the employ of the company undertook to put the plaintiff on the train and followed the train while it was in motion, running for a distance of one hundred feet or more,

and struck against the truck which was in a proper place, you will find for the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

(Printed record page 215.)

SPECIFICATION No. 11.

Assignment of Error No. 12. (Printed record page 14.)

"12. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, instruction Number Thirteen, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 13.

"Requested by Defendant.

"The court instructs the jury that a railway company has the right to presume that passengers will only attempt to get on and off its cars at the places designated by the company for such purpose, and it is not the duty of the railroad company to keep its tracks or platforms clear for those who may see proper to pursue the cars while leaving its depot or station.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

(Printed record page 216.)

SPECIFICATION No. 12.

Assignment of Error No. 13. (Printed record pages 14 and 15.)

"13. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of

the law of the case, Instruction Number Fourteen, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 14.

"Asked by Defendant.

"The Court instructs the jury that if you find from the evidence that plaintiff, Samuel Calhoun, at the time of the injury was an infant of tender years, to-wit, three years of age or less and you further find from the evidence that his mother, Anna Calhoun, purchased from the defendant at Arkansas City, Kansas, one ticket for herself to Edmond, Oklahoma, and that under the rules of the railway company, she was permitted to take with her without extra charge, her infant son, the said Samuel Calhoun, plaintiff herein, then the railway company had the right to presume that the said Anna Calhoun would properly care for and guard the said child from danger; and if you further find that the said Anna Calhoun without the knowledge of the servants of the railway company attempted to alight from said train while in motion and handed plaintiff off from said train while in motion to a stranger, and because of the fact that said train was in motion at that time at such a rate of speed that the said Anna Calhoun on account of her own personal safety refused to alight, and while said train was so in motion requested or permitted the said Carl Jones to attempt to place plaintiff back on the train then such conduct on the part of the said Anna Calhoun would constitute negligence that would preclude the plaintiff from recovering in this action even though you should find that defendant's servants failed to call said station of Edmond upon the approach of said train and failed to light the platform of said station, and even though you should further find that the leaving of said truck

on the platform at the place where the same was left was negligence on the part of the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge*."

(Printed record page 216.)

SPECIFICATION No. 13.

Assignment of Error No. 15. (Printed record page 16.)

"15. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Sixteen, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 16.

"*Asked by Defendant.*

"This court at the request of the defendant has submitted to you certain special questions of fact for you to answer, and you are instructed that it is your duty to answer each of these questions fairly as you shall find the truth to be under the evidence and without regard to your general verdict.,

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge*."

(Printed record page 217.)

SPECIFICATION No. 14.

Assignment of Error No. 16. (Printed record pages 16 and 17.

"16. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the District Court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Seventeen, requested by defendant below; which said instruction

as requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 17.

"*Requested by Defendant.*

"You are further instructed that if you find from the evidence that the defendant failed to announce the station of Edmond and further find from the evidence that the defendant stopped the train at said station a reasonable time for passengers to get off and on the train and that the said train was stopped at a place where a suitable platform was provided for entering and leaving the train, and you further find from the evidence that the said train had a baggage car and carried the baggage of its passengers and that the defendant had a truck on the platform at the said baggage car which said truck was left on the platform at a place where passengers were not required or expected to enter or leave the train in question you are instructed that the leaving of such truck upon the platform at said place not intended or necessary for the use of passengers in alighting from or entering the train, such action on the part of the defendant was not negligence, and if you find from the evidence that after plaintiff had alighted from the train a stranger not in the employ of the defendant, without the knowledge or consent of the defendant undertook to put the plaintiff on the train and followed the train while in motion, running for a distance of one hundred feet or more carrying the plaintiff, under such circumstances that a reasonable prudent person ought to have recognized the danger, and ran against such truck, which caused the injury, you will find for the defendant.

"Refused and excepted to by defendant.

"R. F. BURWELL, *Judge.*"

(Printed record page 217.)

SPECIFICATION No. 15.

Assignment of Error No. 17. (Printed record page 17.)

"17. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Eighteen, requested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 18.

"Requested by Defendant.

"The Court instructs the jury that in determining whether the act of the defendant complained of is the proximate cause of the injury the legal test is: Was the injury of such a character as might reasonably have been foreseen or expected as the natural result of the act complained of. A party is not chargeable with responsibility for results which do not naturally and reasonably follow as the consequence of his conduct; as a matter of law a party cannot be held responsible for injuries which could not reasonably have been foreseen and expected as the result of his conduct.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

(Printed record page 218.)

SPECIFICATION No. 16.

Assignment of Error No. 18. (Printed record pages 17 and 18.)

"18. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, said Territory, in refusing to submit to the jury and give to the jury as a part of the law of the case, Instruction Number Nineteen, re-

quested by defendant below; which said instruction so requested by said defendant is in words and figures as follows, to-wit:

"INSTRUCTION No. 19.

"Requested by Defendant.

"The court instructs the jury: That where witnesses have testified that they did not hear, or that certain words were not spoken at a certain time or place, such testimony is what is termed in law as negative testimony and that such testimony is not entitled to as much weight or consideration at the hands of the jury as the testimony of equally credible witnesses who testify to having heard such word spoken on such occasion, such testimony that the witness did hear being what is termed by the law positive or affirmative evidence.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

(Printed record page 218.)

SPECIFICATION No. 17.

Assignment of Error No. 19. (Printed record pages 18 and 19.)

"19. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in giving to the jury as a part of its instructions to the jury, all that portion of the said instructions beginning with the word 'it' in line 20 on page 233 of the record, printed record page ———, to and including the word 'station' found on page 235 in line 6 of record, printed record page ———, which said portion of the said general instructions so complained of is in words and figures as follows, to-wit:

"It is the duty of railroad employees running a railway train to call the names of the stations along the line of road a sufficient length of time before the

train reaches the respective stations to enable passengers for such station to collect their baggage and have a reasonable length of time to get ready to quit the train at such point; but if the conductor on the train in question informed Mrs. Calhoun just after the train left South Guthrie that the next stop would be at Edmond, then, and in that event, so far as this case is concerned it is immaterial as to whether the employees or any of them called the station of Edmond before the train reached that place; but as to whether the conductor notified the mother of the plaintiff just after the train left South Guthrie that the next stop would be Edmond or as to whether the employees of the company called the station of Edmond before the train reached that point you are to determine in the light of all of the facts and circumstances appearing upon the trial. And the burden would be upon the plaintiff to establish that the station of Edmond was not called in the usual manner but the burden would be upon the company to establish that the conductor notified the mother of plaintiff just after the train left South Guthrie that the next stop would be at Edmond. The law presumes that events occur in the usual and ordinary way and one claiming an exception to the usual and general rule must establish such exception by a preponderance of evidence. Under the evidence in this case it has been shown that the plaintiff on the trip in question was traveling with his mother and that he was under the age at which the railroad company charges fare and under those circumstances it was the duty of the mother of the plaintiff, to care for him and protect him from injury. In other words, the duty of looking after the plaintiff on this trip devolved upon the mother of the plaintiff and not upon the employees of the railroad company; and if the conductor informed the mother of the plaintiff just after the train had left South Guthrie that the next stop would be at Edmond or if the porter on the train called the station of Edmond in the usual and ordinary way a sufficient length of time before

the train reached Edmond to enable the mother of the plaintiff to get ready to leave the train at that point then and in that event the railroad company would have fully performed its duty as to notifying the mother of the plaintiff as to the station."

(Printed record pages 219 and 224.)

SPECIFICATION No. 18.

Assignment of Error No. 20. (Printed record page 19.)

"20. The Supreme Court of Oklahoma Territory erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in giving to the jury and instructing the jury as a part of its instructions all that portion thereof beginning with the word 'if,' in line 7 on page 235 of the record, printed record page ——, to and including the word 'alight' found in line 20, page 235 of the record, printed record page ——, which said portion of the said general instructions so excepted to is in words and figures as follows, to-wit:

"If notice was given in either of those ways the company had a right to presume that she would be prepared to get off the train when it stopped and if she failed to attempt to get off the train until it started it was her duty to stay on the train until it could be stopped unless it reasonably appeared safe to alight, and she would not have the right to alight from the train which was moving so fast as to render it dangerous for her so to do and it would also be negligence for her or any one else to attempt to place the plaintiff back on the train after he had been taken therefrom if such act reasonably appeared dangerous, and it would be no sufficient excuse, for placing the child in a perilous position, to say that the mother and child were separated by the negligence of the defendant company in failing to stop a sufficient length of time for both mother and child to alight."

(Printed record pages 220 and 224.)

SPECIFICATION No. 19.

Assignment of Error No. 21. (Printed record page 19.)

"21. The said Supreme Court erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in giving to the jury as a part of its general instructions, all that portion of said instructions commencing with the word 'but' found in line 20, page 235 of the record, printed record, page ———, to and including the word "infant' found in line 2 on page 236 of the record, printed record page ———, which said portion of the instructions so given to the jury is in words and figures as follows, to-wit:

"But you are also instructed that the negligence of the mother or of any other person is not chargeable to the plaintiff nor can his rights be affected thereby. A child of tender years who had not reached that age where it can distinguish a place of safety from one of danger cannot be defeated in its right to recover for personal injury for the negligence of others who have it in charge; and every one who wilfully, wantonly or negligently commits or omits to perform an act when such act is by law required of them, which might reasonably have been expected to result in such injury is jointly or severally liable to such infant."

(Printed record pages 220 and 224.)

SPECIFICATION No. 20.

Assignment of Error No. 22. (Printed record pages 19 and 20.)

"22. The said supreme court erred in affirming the judgment of the district court of Oklahoma County, Oklahoma Territory, in giving to the jury as a part of its general instructions, that portion thereof commencing with the word 'now' in the 6th line, page 237 of the record, printed record page———, to and including the word 'anticipated' found in line 5 page 238, of the record, printed record page ———, which

said portion of the general instructions so excepted to is in words and figures as follows, to-wit:

"Now, bearing in mind the rules of law which are given in these instructions before the plaintiff can recover it must affirmatively appear by a preponderance of the evidence, either first; that a reasonable time was not given the passengers to alight and that the employees of the company or some one of them saw Jones trying to put the child back on the train and give it to its mother and that such employee or employees knew or ought to have known that such act would probably result in injury to the plaintiff or that the injury to plaintiff might reasonably have been anticipated as the result of such act and that with such knowledge said employees negligently failed to stop the train, when they reasonably could have done so, or second; that the company was guilty of negligence in leaving the truck in a dangerous position and in not having the depot platform properly lighted and that such condition directly and approximately contributed to the injury; and in this connection you are instructed that in order to recover for injury claimed to be the result of some negligence on the part of another a plaintiff must not only prove that the injury was the direct and approximate result of such negligence, but it must appear that the injury is such as might have been reasonably expected to flow from such negligent act or omission. It is not sufficient to authorize a judgment against the defendant in this case to be able to find that in the realm of speculation the injury in question might occur as the result of the conditions on the platform but to establish such negligence as will render the defendant liable you must be able to find from the evidence that the injury was the natural result of such negligence and such as should in the ordinary course of human events have been reasonably anticipated."

(Printed record pages 221 and 224.)

SPECIFICATION No. 21.

Assignment of Error No. 23. (Printed record page 20.)

"23. The supreme court erred in affirming the judgment of the district court in giving to the jury as a part of its general instructions, all that portion thereof beginning with the word 'the' in the 5th line on page 238 of the record, printed record page———, to and including the word 'trains' found in line 17 same page, printed record page ————, which said portion of the said instructions is in words and figures as follows, to-wit:

"The company have a right to use trucks on its platform for the loading and unloading of express and baggage, and if, in using such trucks, the company employ every reasonable precaution to avoid injury to persons getting on and off of its passenger trains, that is all that the law requires; and in determining as to whether the company used reasonable care to avoid injury in this case you may take into consideration the length of the platform, the condition of light or darkness on the platform, together with all of the other facts or circumstances surrounding the transaction, and you should in this connection also take into consideration the fact as to whether or not the truck was at the time of the accident on or off of that part of the platform used by passengers for getting on and off of its trains."

(Printed record pages 222 and 224.)

SPECIFICATION No. 22.

Assignment of Error No. 24. (Printed record page 21.)

"24. The supreme court erred in affirming the judgment of the district court in giving to the jury as a part of its general instructions all that portion thereof beginning with the word 'a' in 17th line, page 238 of the record, printed record page ——, to and including the word 'circumstances' found in 22nd line, page 238, printed record page ———, which said

portion of the said instructions so excepted to is in words and figures as follows, to-wit:

"A railroad company has a legal right to adopt such rules and regulations as are necessary for the convenient and economical conducting of its business, provided however, that the accommodations provided are sufficient to meet the demands of the business, and are all that are reasonably necessary under the circumstances."

(Printed record pages 222 and 224.)

SPECIFICATION No. 23.

Assignment of Error No. 25. (Printed record page 21.)

"25. The supreme court erred in affirming the judgment of the district court in giving to the jury as a part of its general instructions all that portion thereof commencing with the word 'and' in 22nd line, page 238, printed record page ———, to and including the word 'instructions' found in line 2, page 239, printed record page ———, which said portion of the general instructions so excepted to is in words and figures as follows, to-wit:

"And in determining as to whether or not the defendant is liable in this case you should also take into consideration the place of the accident; that is as to whether it occurred on or off that part of the depot used by passengers, as the company would have a right to presume in the absence of actual knowledge that persons would not attempt to get on a fast moving train after it had passed the passenger platform; but all issues of fact are to be determined by you under the rules laid down in these instructions."

(Printed record pages 222 and 224.)

SPECIFICATION No. 24.

Assignment of Error No. 26. (Printed record pages 21 and 22.)

"26. The supreme court erred in affirming the judgment of the district court in overruling the mo-

tion of defendant below to set aside the findings of the jury to certain questions submitted to the jury, numbered 12, 14, 39, 42, and 44, which said motion was for the reason and upon the ground that the answers to the said questions were not supported by sufficient evidence or by any evidence submitted on said cause, which said motion of the defendant is found on record page 265, and the said questions and answers so objected to are in words and figures as follows, to-wit:

"12. Did not one of defendant's employees call the station before the train stopped at Edmond station?

"Answer. It was not called.

"JOHN Q. SPENCER, *Foreman.*

"14. How long did the train stop at Edmond before the accident to the plaintiff occurred?

"A. One minute.

"JOHN Q. SPENCER, *Foreman.*

"39. Was the truck left on the platform opposite where the baggage car was stopped in the train when it stopped at the station of Edmond to enable passenegers to alight from and board the said train?

"A. No.

"JOHN Q. SPENCER, *Foreman.*

"42. Did the lights in said car shine out through the windows of the car onto the platform?

"A. No.

"JOHN Q. SPENCER, *Foreman.*

"44. Did such lights shine out onto the platform where persons would alight from and enter the car in which plaintiff and his mother were passengers from Arkansas City to Edmond?

"A. No.

"JOHN Q. SPENCER, *Foreman.*

(Printed record pages 232 to 238 inclusive—also 239 and 244.

SPECIFICATION No. 25.

Assignments of Error Nos. 27 and 29. (Printed record page 22.)

> "27. The supreme court erred in affirming the judgment of the district court in overruling the motion of the defendant for a judgment on the findings of the jury notwithstanding their general verdict, which said motion of defendant below is found on record page 267.
>
> "29. The supreme court erred in affirming the judgment of the district court in overruling the motion of the defendant below for judgment on the special findings and answers to the special questions submitted to the said jury, the general verdict of the jury to the contrary notwithstanding."

(See printed record page 22 for assignment; for motion see printed record page 240, and printed record page 245 for ruling of the court and exceptions; and printed record pages 225 to 237, inclusive, for special finding of the jury.)

SPECIFICATION No. 26.

Assignment of Error No. 28. (Printed record page 22.)

> "28. The Supreme Court erred in affirming the judgment of the district court of Oklahoma County, in overruling the motion and amended motion of the defendant below to set aside the verdict of the jury and to grant to defendant a new trial."

(For assignment of error see printed record page 22; for motion and amended motion to set aside the verdict and judgment and for a new trial see printed record pages 240 to 243, inclusive, and for ruling of the trial court and exceptions see printed record pages 245 and 246.)

SPECIFICATION No. 27.

Assignment of Error No. 30. (Printed record pages 22 and 23.)

> **"30. The Supreme Court erred in affirming the judgment of the district court in rendering judgment in favor of the plaintiff below and against the defendant below, the said judgment of the said district court not being sustained by sufficient evidence and being contrary to the evidence and contrary to the law and contrary to the special findings of fact by the jury."**

(For assignment see printed record pages 22 and 23.)

For convenience we will discuss the questions involved in these specifications of error in this case under the following heads:

FIRST.

The Supreme Court of the Territory erred in affirming the judgment and ruling of the trial court, in failing to separately state and number its instructions to the jury as requested, and as required by statute, and in not properly stating the law of the case in the instructions given, and in refusing the instructions requested by the defendant.

SECOND.

The Supreme Court of the Territory erred in sustaining the ruling of the trial court in overruling the motion of the defendant to set aside the findings of the jury to certain questions of fact submitted to the jury numbered 12, 14, 39, 42, and 44, the same not being supported by sufficient evidence.

THIRD.

The Supreme Court of the Territory erred in sustaining the judgment and ruling of the trial court in overruling the demurrer of the defendant to the evidence of the plaintiff, in refusing defendant's request to peremptorily instruct the jury

to find for defendant, in overruling the motion of the defendant for judgment on the findings of the jury, and in overruling the motion and amended motion of the defendant to set aside the verdict of the jury and to grant to the defendant a new trial.

ARGUMENT.

1.

The supreme court of the Territory erred in affirming the judgment and ruling of the trial court, in failing to separately state and number its instructions to the jury as requested, and as required by statute, and in not properly stating the law of the case in the instructions given, and in refusing the instructions requested by the defendant.

Specifications of error No. 2, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, No. 11, No. 12, No. 13, No. 14, No. 15, No. 16, No. 17, No. 18, No. 19, No. 20, No. 21, No. 22, No. 23.)

The supreme court of the Territory, in its opinion Printed Record, page 262, says:

> "It is argued that the court erred in failing to separately state and number his instructions to the jury, and erred in not properly stating the law of the case in such instructions, and in refusing instructions requested by the defendant. At the conclusion of the testimony, the court instructed the jury in writing, but it seems that by some inadvertence the instructions were not numbered. While our statute requires the instructions to be reduced to writing and numbered, when requested by either party, the mere failure to number each instruction separately, in our opinion, is not sufficient to constitute reversible error. The instructions in this case were reduced to writ-

ing, and each proposition of law involved in the case is clearly and concisely stated, and, an exception was allowed to each and every part of the charge and the rights of the railway company were fully protected, and in our opinion, the instructions were as favorable to the railway company as the facts in this case would justify. Hence, we are unable to perceive how the mere failure to number the instructions could constitute prejudicial error."

At the beginning of the trial in the trial court (printed record page 40) the attention of the court was called to the statute as follows:

> "And thereupon at the beginning of the trial, the defendant requested the court to instruct the jury in writing, and to separately state and number his instructions as provided by the statute."

Again before the instructions were read to the jury (printed record page 224.) the attention of the court was again challenged to the statute as follows:

> "Be it further remembered that at the time the court instructed the jury as aforesaid and before such instructions are read to the jury, the defendant objects and excepts to the same as a whole, because such instructions are not separately stated and numbered as requested and as required by statute, and for the further reason that such instructions are conflicting and misleading and do not correctly state the law of the case."

The fifth subdivision of section 264, article 15, chapter 66, of Wilson's Revised and Annotated Statutes of Oklahoma, 1903, is as follows:

> "When the evidence is concluded and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court. The court shall give general instructions to the jury, which shall

be in writing, and be numbered, and signed by the judge, if required by either party."

In this case the court instructed the jury in writing. The instructions, however, were not separately stated or numbered.

The attention of the court being called to the statute by timely request at the beginning of the trial and again called to the attention of the court before the instructions were read to the jury, it is hardly within reason to say that the failure to number these instructions was an "inadvertance" on the part of the trial court. The instructions were not even paragraphed, so that reasonable objections could be made by counsel for defendant or proper exceptions taken.

There is not a single proposition of law stated in the instructions without modification and the entire instructions are strung together without proper punctuation or separation of one proposition of law from another. As presented, the instructions are a bundle of contradictions that cannot be separated by even a skilled lawyer, much less by a jury.

If there ever was a case which illustrates the wisdom of the statutory provision, this is the case. An examination of the instructions will show to the court how difficult it would be to take this record and these instructions and undertake to paragraph the same so as to make a set of instructions separately stated and numbered.

The method to which counsel was compelled to resort to save exceptions to the instructions given illustrates the wisdom of the statutory provision, and the fact that the instructions given in such a manner must necessarily be misleading, even though they should state correctly the propositions of law.

The supreme court of the Territory says that the railway company had the benefit of its exceptions. It also had the misfortune of having these instructions so strung together

that a skilled lawyer, much less a jury, could not separate one part from the other.

It will be noticed by the language of the section, "the court shall give general instructions to the jury which shall be in writing and be numbered, and signed by the judge, if required by either party," that the instructions should be numbered is as imperative by the language of the statute as it is that the instructions shall be in writing.

In State *vs.* Huber, 8 Kan., 447, the third point of the syllabus is as follows:

> "Section 236 of the Criminal Code provides that the court 'must charge the jury in writing;' and it is error to omit to do so in any criminal case."

In the opinion, at page 451, the court say:

> "The defendant raises two other objections: First, he claims that the court below did not charge the jury in writing. If this is true, and it seems to be true from the record, of course, the court erred in this respect."

In State *vs.* Potter, 15 Kan., 302, the fifth point of the syllabus is as follows:

> "The statute requiring a written charge to the jury in criminal offenses, is imperative, and the failure to comply with it is an error compelling a reversal."

In the opinion, at page 314 *et seq.*, many cases are cited, and including civil as well as criminal cases, in which it is held that such statutes are mandatory.

In the case of City of Atchison *vs.* George Jansen, 21 Kan., 560, the first point of the syllabus is as follows:

> "The statute provides that in civil cases the court shall, when requested by either party, reduce its instructions to writing. This provision is mandatory, and a disregard of it is error, compelling a reversal. Hence, when the record contains several

pages of instructions, which were given orally to the jury, in disregard of the demand of one party for written instructions, and some of which are plainly instructions upon the law of the case, and not mere directions as to the form of the verdict or other collateral matters; *held*, that this court must reverse the judgment on the petition of the party demanding written instructions, irrespective of the question whether such oral instructions as are incorporated into the record are correct statements of the law applicable to the case."

In the opinion, at page 570, Brewer, J., says:

"The first matter we shall notice is the error in giving oral instructions. The law in force (sec. 1, subdivision 6, Laws 1872, p. 329,) provides that 'when the argument of the case is concluded, the court shall give general instructions to the jury, which shall be in writing and be numbered and signed by the judge if required by either party.' And subdivision 7 of said section provides further, that 'all instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record." * * *

At page 571, Justice Brewer says:

"In the case at bar, the defendant fully complied with the statute in requiring all instructions to be reduced to writing. Notwithstanding this, the court instructed the jury orally in submitting the case, and these instructions thus given orally fill out eleven pages of the transcript."

* * * * * * * * *

Again, at page 572:

"We have had occasion heretofore to examine the question as to the necessity of written instructions, and the extent and scope of the statute, at least in criminal cases."

State *vs.* Potter, 15 Kan. 302.

See also—

State *vs.* Huber, 8 Kan. 447.
Prater *vs.* Sneade, 12 Kan., 447.
State *vs.* Mortimer, 20 Kan., 93.

> "We do not deem it necessary to review the question at any length in this case. We refer to the valuable list of authorities provided by counsel for plaintiff in error, as showing the extent to which courts have gone in enforcing the statute concerning written instructions, some more and some less stringent than ours."

See cases cited.

In the case of Rich *vs.* Lappin, 43 Kan., 666, the syllabus of the case is as follows:

> "The district court must give its instructions to the jury in writing, when requested so to do by either party; and the giving of them orally and having them taken down by a stenographer, and after the jury has retired, having them written out by the stenographer, is not sufficient."

To the same effect—

State *vs.* Bennington, 44 Kan., 583.
Wheat *vs.* Brown, 3 Kan. Appeals, 431.
Opinion page 436.
Scruton *vs.* Hall, 6 Kan. Appeals, 714.
Opinion, page 717.

In the case of Townsend *vs.* Doe, 8 Blackf., 328, the law is stated as follows:

> "After the testimony in this case was closed, the defendants moved that every instructions, or modification, or explanation thereof to the jury, should be in writing and objected to any instruction or modification, or explanation thereof being given unless same should be written. *Held*, that the court, by afterwards giving at the plaintiff's request, the in-

structions to the jury with verbal explanations and illustrations, committed an error.

Stat. 1839, page 37."

In the case of Rising Sun and Versailes Turnpike Co. *vs.* Conway, 7 Ind., 187, the first paragraph of the syllabus is as follows:

"When the court is requested, at the proper time, to give its charge to the jury in writing, the whole charge should be in writing and should be given literally as it is written."

In the opinion the court say:

"The turnpike company requested, at the proper time, that the charge should be in writing. Yet, it appears from the bill of exceptions, that the 'court proceeded to charge the jury verbally from the writing lying before it. Upon being reminded that the charge should be in writing, the court remarked that a part of it was reduced to writing, and that what had been given should likewise to reduced to writing. Accordingly, the charge given verbally was substantially, but not literally, reduced to writing, and then read over again to the jury.' To this action of the court the company excepted and now assign it for error. The object of the statute, first enacted in 1839 (Laws of 1839, p. 37), requiring the charge to be in writing, if so requested, was to present to this court the ruling below in the very language of that court. The evil to be remedied was the difficulty, severely felt by the bar, of getting a bill of exceptions which should fully embody the verbal charge. The act should, therefore, receive such a beneficial construction as should effect the object designed. The words of the court, on such occasions, are too weighty and decisive in their influence on the jury to be omitted. A particular turn of expression, given perhaps at random, may be decisive of the rights of parties. The proper construction of the statute, therefore, is, that the whole charge shall be in writing; and that it should be given literally as it is thus written. Such

seems to have been the construction of the act from the first.

"8. Blackf., 328.

"1. Ind. R., 385.

"5 *id.*, 375.

"There is no great hardship in the strictness thus imposed. Its safe and beneficial operation is obvious. Were the rule once relaxed, it is easy to see that the object of the act would be defeated."

The Oklahoma statute provides that the instructions shall be in writing and be numbered and signed by the judge if required by either party. The object of the statute is plain that each proposition of the law shall be so distinctly given and the instructions numbered, so that proper exceptions may be noted by the party at the time, and the propositions of law as stated shall be correctly and separately stated, so that the jury may understand the instructions. The legislature deemed this provision wise and placed it on the statute books. Can the court with impunity disregard this provision of the statute any more than it may disregard the provisions of the statute requiring the instructions to be reduced to writing?

In the case of Laselle *vs.* Wells, 17 Ind, 33, the first paragraph of the syllabus is as follows:

"A rule of court requiring a party desiring written instructions only, to be given to the jury, to notify the court of such desire before the trial commences, is repugnant to the laws of this state."

Riley *et al vs.* Watson, 18 Ind., 291.

The Toledo and Wabash Ry. Co. *vs.* Daniels, 21 Ind., 256.

In the opinion, at page 260, the court say:

"The code says: 'When the argument of the cause is concluded, the court shall give general instructions to the jury, which shall be in writing, and be numbered and signed by the judge, if required by either party.' "

"2 R. S. (G. & H.), p. 198, sec. 324.

"This provision seems to be imperative. Indeed we have often decided that when the court has had timely notice of the desire of one of the parties that a written charge only shall be given to the jury, it is error to give a verbal charge, or if written, to accompany it with verbal modifications or explanation. * * *.

"But the appellees argue that the spirit of the law has been complied with, that its purposes was to give the party, requiring instructions to be in writing, the benefit of a record containing the words used by the court, that, in this instance, the judge at the very time the objection was made, set out in a bill of exceptions, the exact words used by him in his verbal charge, and hence the plaintiff has no right to complain.

"We are not inclined to adopt that argument. The statute, as we understand it, requires the court, when asked for written instructions, to reduce them to writing, and then give them, as written, to the jury. This construction of the statute, in its strictness as a rule of practice, imposes no hardship and were the rule once relaxed it is easy to see that the object of it would be defeated. * * * * We think that the court, in charging verbally when requested to charge in writing, comitted an error for which there should be a reversal."

In the case at bar, it would seem equally true that the provision requiring the instructions to be numbered imposes no hardship on the court. The request was timely made and the court given every opportunity to observe the requirements of the statute.

When the instructions were presented to be read to the jury the attention of the court was again called to the requirements of the statute and request made that his instructions should be separately stated and numbered. This request was disregarded by the court and proper exceptions taken. To hold

that this is not reversible error in the case at bar is to hold that the trial court may disregard the plain provisions of the statute, and amounts to a judicial repeal of the statutory requirements.

Meredith *vs.* Crawford, 34 Ind., 399.

In the case of Hardin *vs.* Helton, guardian, 50 Ind., 319, the court holds that where a court is requested to instruct the jury in writing and gives a portion of the instructions orally, to which the party excepts, is error, for which the judgment will be reversed, whether the portion given orally is in itself right or wrong.

In the opinion, at page 324, the court say:

> "Charges are much more likely to be correct and accurate when written before delivery, than when delivered orally. But we base our decision upon the ground that it was error to give the charge orally, whether, in itself, it was right or wrong. We have a statute that requires the instructions to be in writing if required by either party."
>
> Ohio and Mississippi Railway Co. *vs.* Rowland, 51 Ind., 285.

In Paterson *vs.* Ball, 19 Wis., 243, the court in the opinion, at page 245, say:

> "The circuit court also erred in refusing to reduce its charge to the jury to writing. Sec. 12, ch. 132, R. S., provides that 'whenever on the trial of any cause in the circuit court, either party shall request it, the judge presiding in such court shall reduce his charge to the jury to writing, before giving the same to the jury; and if any such judge shall give any charge to the jury on the trial of any cause, when so requested, without the same being in writing, it shall be sufficient cause for reversing on appeal or error to the Supreme Court, the judgment which may be rendered therein.
>
> "After the evidence was all in and before the counsel for either party had begun to argue the cause

to the court or jury, the defendant's counsel requested the judge to reduce his charge to the jury to writing. The judge did not comply with the request, but gave a part of his charge without its being reduced to writing. The circuit judge of the first circuit has adopted a rule that such request must be made at or before the commencement of the trial; and it is claimed that this rule is reasonable and does not conflict with the statute. In courts of record instructions are originally presented to the court after the evidence is in and before summing up the cause to the jury, and frequently just before the court charges the jury. Until the testimony is closed, the judge could not well begin to reduce his charge to writing; for his charge is presumed to be based upon the evidence in the case."

Hardy *vs.* Turney, 9 O. St. 400.

In the opinion, at page 401, the court say:

"The statutory provision, in force at the time of the trial, and which must determine this question, * * * reads thus:

"In all cases tried to a jury, the presiding judge shall, on the application of either party to the case on trial, before the jury retire to consider of their verdict, reduce to writing the charge of the court upon any point of law involved in the case, and such charge shall remain on file among the papers in the cause." * * *

"The language of this statute is imperative, and its purpose apparent."

Householder *vs.* Granby, 40 O. St., 430.

In the case of Coppage *vs.* Commonwealth, 3 Bush, Ky., 532, the second point of the syllabus is as follows:

"Oral declarations of the court, which are virtual instructions, being merely oral, are illegal, according to the criminal code."

Stratton *vs.* Paul, 10 Iowa, 139.

Head & Metzger *vs.* Langworthy & Brothers, 15 Iowa, 235.

In volume 11, Encyclopedia of Pleading and Practice, page 270, the law is stated as follows:

> "In some jurisdictions it is provided by statute that instructions to the jury shall be numbered, but a failure to comply with this requirement is not a ground for reversal unless excepted to at the time the instructions were given. Unless the aggrieved party objects in apt time he cannot be heard afterwards to complain of the omission. The objection cannot be made for the first time on a motion for new trial."

In the case at bar, however, the court at the beginning of the trial was requested to instruct in writing and to separately state and number the same as required by the statute. Again, when his instructions were read to the jury and before they were read to the jury, objections were made to the instructions because they were not separately stated and numbered, as requested and as required by the statute. It was again called to the attention of the trial court by the motion for new trial so that in this case the defendant was vigilant to protect its rights in that respect.

In the case of Smith *vs.* State, 4 Neb., 277, in the opinion, at page 287, the court say:

> "It is objected to the instructions given by the judge on his own motion: *First.* That although embodying several distinct propositions of law, they were not paragraphed nor numbered as required by the act of February 25, 1875. *Second.* That the law of the case was not correctly given.
>
> "As to the first point, it is true that section one of said act declares it to be the duty of the judge to reduce his instructions to writing before giving the same to the jury, unless the same be waived by counsel in open court, and entered of record in the case. This section is no doubt mandatory, and a non-compliance in any case if properly brought to the attention of this court, would call for a reversal of the

judgment. But in this case all the charge was reduced to writing at the proper time, and there is no complaint in this respect. Section 4, of the act provides, among other things, that, 'All instructions given to the jury by the court on its own motion, must be plainly and legibly written, in consecutively numbered paragraphs, and filed by the court before being read to the jury by the court.' This provision we regard so far imperative, that a party may insist upon its being observed by the court. It was intended, doubtless, that each distinct proposition of law, or statement of fact, should be so set forth as to enable counsel readily to comprehend its purport, and if desirable to except to it by a simple reference to its number."

To the same effect—

Gibson *vs.* Sullivan *et al.*, 18 Neb. 558, S. C. 26 N. W. Rep. 368.

Jolly *vs.* State, 43 Neb., 857, S. C. 62 N. W. Rep. 300.

We venture the assertion here that the decision of the court in this case on a record of this kind stands alone without support from the decisions of any other court, and by the decision the court not only repeals the statute, but overturns the long line of cases above cited.

In the case at bar the instructions of the court and the different propositions of law were so welded together that in order to save exceptions it became necessary for defendant's counsel to dissect the instructions and state its objection and exception to the instructions from a designated word in a designated line to another designated word in another designated line.

Every proposition of law submitted was modified. In fact ,there is not a direct statement of law in the charge which the court told the jury they must observe. In effect, he told the jury that they might do as they pleased, and any verdict would have been warranted by the instructions.

While it is true that the instructions of the court must be taken as a whole, direct propositions of law should be stated by the court without neutralizing the effect of such instructions by coupling the same unexplained with other instructions that might be applicable to entirely different state of facts.

We will now consider the specific portions of the charge which we have been compelled to dissect and designate as from a certain word in a certain line to a certain other word in a certain other line.

That portion of the general instructions given by the court beginning with the word "it," in line 4, on page 233, counting from the bottom to and including the word "station," found on page 235, in line 6, counting from the top of said page (Printed record pages 219 and 220), is as follows:

> "It is the duty of railroad employees running a railway train to call the names of the stations along the line of road a sufficient length of time before the train reaches the respective stations to enable the passengers for such station to collect their baggage and have a reasonable length of time to get ready to quit the train at such point; but if the conductor on the train in question informed Mrs. Calhoun just after the train left South Guthrie that the next stop would be at Edmond, then, and in that event, so far as this case is concerned it is immaterial as to whether the employees or any of them called the station of Edmond before the train reached that place; but as to whether the conductor notified the mother of the plaintiff just after the train left South Guthrie that the next stop would be at Edmond or as to whether the employees of the company called the station of Edmond before the train reached that point you are to determine in the light of all the facts nad circumstances appearing upon the trial. And the burden would be upon the plaintiff to establish that the station of Edmond was not called in the usual manner

but the burden would be upon the company to establish that the conductor notified the mother of plaintiff just after the train left South Guthrie that the next stop would be Edmond. The law presumes that events occur in the usual and ordinary way and one claiming an exception to the usual and general rule must establish such exception by a preponderance of evidence. Under the evidence in this case it has been shown that the plaintiff on the trip in question was traveling with his mother and that he was under the age at which the railroad company charges fare and under those circumstances it was the duty of the mother of the plaintiff, to care for him and protect him from injury. In other words, the duty of looking after the plaintiff on this trip devolved upon the mother of the plaintiff and not upon the employees of the railroad company; and if the conductor informed the mother of the plaintiff just after the train had left South Guthrie that the next stop would be at Edmond or if the porter on the train called the station of Edmond in the usual and ordinary way a sufficient length of time before the train reached Edmond to enable the mother of the plaintiff to get ready to leave the train at that point then and in that event the railroad company would have fully performed its duty as to notifying the mother of the plaintiff as to the station."

The vice of this instruction, under the proof and findings in this case, is that the question of notice to the mother of plaintiff or the calling of the station could not in any way be held as contributing to the injury complained of, and in this and other instructions the court authorized the jury to find a verdict for the plaintiff if the station was not called, or the mother of plaintiff was not notified, as testified to by the conductor.

In this connection the court will bear in mind that the plaintiff was taken from the train in safety and placed on the platform in a place of safety; hence the instruction with

relation to the conflict between the testimony of the plaintiff's mother and the conductor, as well as to the conflict as to whether or not the station was called, were immaterial matters, which should not have been submitted to the jury, and therefore misleading and an improper statement of the law of the case.

The defendant also specifically excepted to that part of the general instructions given by the court beginning with the word "if," in line 7, on page 235, of the case- made, counting from the top, to and including the word "alight," found in line 20, counting from the top of said page of case-made, (printed record page 220), which is as follows:

> "If notice was given in either of those ways the company had a right to presume that she would be prepared to get off the train when it stopped and if she failed to attempt to get off the train until it started it was her duty to stay on the train until it could be stopped unless it reasonably appeared safe to alight, and she would not have the right to alight from a train which was moving so fast as to render it dangerous for her so to do and it would also be negligence for her or any one else to attempt to place the plaintiff back on the train after he had been taken therefrom if such act reasonably appeared dangerous, and it would be no sufficient excuse, for placing the child in a perilous position, to say that the mother and child were separated by the negligence of the defendant company in failing to stop a sufficient length of time for both mother and child to alight."

The vice of this instruction is manifest. It leaves the jury to understand that if no notice had been given of the approach of said train to the station of Edmond, plaintiff's mother would have the right to alight with the plaintiff from the train moving at a dangerous rate of speed; and tells the jury in effect that plaintiff's mother or Carl Jones would have the right to place plaintiff back on the train after he had

been taken therefrom and placed in a place of safety, although such act was grossly reckless and dangerous; and authorizes the jury to find a verdict against the defendant notwithstanding such reckless act of the mother or Carl Jones, although the servants of defendant were powerless to prevent such action on their part and regardless of all other questions involved in the case.

As applied to facts of this case and the circumstances surrounding the accident, this instruction certainly does not state the law and is misleading.

The defendant also specifically excepted to that portion of the general instructions beginning with the word "but," found in line 20, counting from the top of page 235 of case-made, to and including the word "infant," found in line 2 counting from the top on page 236 of the case-made, (Printed record page 220), which is as follows:

> "But you are also instructed that the negligence of the mother or of any other person is not chargeable to the plaintiff nor can his rights be affected thereby. A child of tender years who has not reached that age where it can distinguish a place of safety from one of danger cannot be defeated in its right to recover for personal injury for the negligence of others who have it in charge; and every one who wilfully, wantonly or negligently commits or omits to perform an act when such act is by law required of them, which might reasonably have been expected to result in such injury is jointly or severally liable to such infant."

The vice of this instruction is found in connection with previous instructions, which state to the jury in effect that if the station was not called the mother would have the right with the plaintiff to alight from a rapidly moving train, and that if such station was not called the mother of plaintiff or Carl Jones would have the right to attempt to put the plaintiff

back on the train, although such act in attempting to place the plaintiff back on the train was a grossly reckless and dangerous one.

On this fact in the case there is no conflict of evidence or of findings, and the court should have instructed the jury as a matter of law that the defendant was not responsible for such grossly reckless act of strangers.

The failure to call the station was entirely disconnected with the act or conduct of Carl Jones in attempting to place plaintiff back on the train. In this respect this instruction is erroneous and misleading.

The defendant also specifically excepted to that part of the general instructions given by the court beginning with the word "now," found in the sixth line, counting from the top of page 237 of the case made, to and including the word, "anticipated," found in line 5, on page 238, counting from the top of the case made, (printed record pages 221 and 222), which is as follows:

> "Now, bearing in mind the rules of law which are given in these instructions before the plaintiff can recover it must affirmatively appear by a preponderance of the evidence, either first; that a reasonable time was not given the passengers to alight and that the employees of the company or some one of them saw Jones trying to put the child back on the train and give it to its mother and that such employee or employees knew or ought to have known that such act would probably result in injury to plaintiff or that the injury to plaintiff might reasonably have been anticipated as the result of such act and that with such knowledge said employees negligently failed to stop the train, when they reasonably could have done so or second; that the company was guilty of negligence in leaving the truck in a dangerous position and in not having the depot platform properly lighted and that such condition directly and approximately con-

tributed to the injury; and in this connection you are instructed that in order to recover for injury claimed to be the result of some negligence on the part of another a plaintiff must not only prove that the injury was a direct and approximate result of such negligence, but it must appear that the injury is such as might have been reasonably expected to flow from such negligent act or omission. It is not sufficient to authorize a judgment against the defendant in this case to be able to find that in the realm of speculation the injury in question might occur as the result of the conditions on the platform but to establish such negligence as will render the defendant liable you must be able to find from the evidence that the injury was the natural result of such negligence, and such as should in the ordinary course of human events have been reasonably anticipated."

This instruction does not fairly submit the question involved and is by the language of the instruction coupled with the erroneous and misleading directions previously given and is not applicable to the undisputed evidence in the case. There was no allegation in the petition or contention that sufficient time was not given the passengers to alight. There was no allegation in the petition and no proof that any of the employees of the railway company saw Jones trying to put the plaintiff back on the train, and no ground of recovery predicated thereon. There was no evidence that the truck was in a place where passengers were expected to alight from or board the train in question or might reasonably have been expected to do either, and the instruction submits this question to the jury when there was no conflict in the evidence and assumes that the truck might have been left in a place where passengers were expected to alight from or board the train. All the testimony, without contradiction, shows that the truck was on that part of the platform made of cinders and was left at the baggage car, one hundred feet or more from the car from which plaintiff alighted, and assumes and submits to the jury

the question whether or not the employees of the company might reasonably have expected Jones to pick up the child from the platform and run alongside of the rapidly moving train for one hundred feet from the place where the car was stopped to enable plaintiff and his mother to alight, when there could be no question but what the truck was left at a proper place, and assumes that the act of Carl Jones while being wantonly reckless and the act of an interloper ought to have been anticipated and prevented.

The defendant also specifically objected and excepted to that part of the general instructions given by the court beginning with the word "the," found in the fifth line, page 238, counting from the top of the case-made, to and including the word "trains," found in line 17, counting from the top of said page, (printed record page 222), which is as follows:

> "The company have a right to use trucks on its platform for the loading and unloading of express and baggage, and if, in using such trucks, the company employ every reasonable precaution to avoid injury to persons getting on and off of its passenger trains, that is all that the law requires; and in determining as to whether the company used reasonable care to avoid injury in this case you may take into consideration the length of the platform, the condition of light or darkness on the platform, together with all of the other facts and circumstances surrounding the transaction, and you should in this connection also take into consideration the fact as to whether or not the truck was at the time of the accident on or off of that part of the platform used by passengers for getting on and off of its trains."

This instruction says the company had the right to use trucks on its platform, and if the company employed every reasonable precaution to avoid injury to persons getting on and off its passenger trains that is all the law requires, without any reference to the case in hand, regardless of where or

under what circumstances a passenger attempts to get on or off its trains, and submits to the jury to take into consideration the length of the platform. There was no complaint in the petition or otherwise or proof that the platform at Edmond was not of proper length or properly constructed. There is no allegation that the accident was occasioned by the platform in any way, and such instruction was not in this respect responsive to any issue either of allegation or proof.

The findings of the jury are that the truck was from seventy-five to one hundred feet from the place of alighting from the coach on which the plaintiff was riding. The evidence in the case shows that it was more than one hundred feet, and the instruction submits to the jury the sufficiency of the platform as to trains in general without any reference to the train in question, and submits to the jury the question as to whether or not the truck at the time of the accident was on or off that part of the platform used for getting on or off of the company's trains without any relation to the train in question or the undisputed evidence in the case or any allegation of negligence in that respect.

The defendant also specifically excepted to that part of the general instruction given by the court, beginning at the word "a," found in the seventeenth line on page 238, counting from the top of the case-made, and to and including the word "circumstances," found in the twenty-second line on said page, counting from the top, (printed record page 222), which is as follows:

> "A railroad company has a legal right to adopt such rules and regulations as are necessary for the convenient and economical conducting of its business, provided, however, that the accommodations provided are sufficient to meet the demands of the business, and are all that are reasonably necessary under the circumstances."

This instruction submits to the jury a question not involved in the case either by allegation or proof, and submits a side issue not relied upon by plaintiff, and imagines a defense not tendered or relied upon by defendant.

There was no allegation in the petition that the defendant had not adopted proper rules or regulations for the conducting of its business at Edmond or claim predicated thereon, or that the facilities for doing business were not entirely adequate, or were in any way the cause of the injury; and there was no defense tendered that the accident occurred because of the carrying out of any rule adopted by the defendant. And yet this instruction permits the plaintiff to recover if the accommodations provided at the station of Edmond at the time of the accident were not sufficient to meet the demands of the business of the station, or if such accommodations were not all that were reasonably necessary under the circumstances.

This instruction had no more to do with the case than the "flowers that bloom in the spring."

The defendant also specifically objected and excepted to that part of the general instructions given by the court beginning with the word "and," found in the twenty-second line of page 238 of case-made, counting from the top, to and including the word "instructions," found in the second line, counting from the top of page 239, of the case-made, which instruction (printed record page 222), is as follows:

> "And in determining as to whether or not the defendant is liable in this case you should also take into consideration the place of the accident; that is as to whether it occurred on or off that part of the depot used by passengers, as the company would have a right to presume in the absence of actual knowledge that persons would not attempt to get on a fast-moving train after it had passed the passenger platform; but all issues of fact are to be determined by you under the rules laid down in these instructions."

The vice of this instruction is that it in effect instructs the jury that passengers would have the right to board a fast-moving train while running past the passenger platform, and consequently that if such conduct on the part of passengers is hazardous the railway company would be required to anticipate and prevent it. It entirely overlooks the relation of the accident to the train in question or the surroundings of the train in question—that is, it says that the company would have a right to presume, in the absence of actual knowledge, that persons would not attempt to get on a fast-moving train after it had passed the passenger platform, and by parity of reasoning therefore it would be bound to prevent passengers from attempting to board a fast-moving train until after it had passed the passenger platform, whereas the law is that it is negligence for any person to attempt to board a fast-moving train at any place.

The court then couples this instruction with the following statement:

> "But all issues of fact are to be determined by you under the rules laid down in these instructions"—

which brings into the instruction and makes a part of it all the other of the instructions which make the defendant liable for failure to call the station or for failure of the servants of defendant to know that Jones was recklessly trying to put the plaintiff back on the train and making the defendant liable practically for the negligence of Jones and for the negligence of the mother, independent agents and rational human beings which the defendant had the right to presume would conduct themselves with proper care and caution.

Misleading or improper instructions should not be given by the court in any case, and these instructions, in the method of their construction, full of erroneous and misleading statements of the law, not being separately stated and numbered,

welded together as they are without separation into paragraphs or proper punctuation, without stating any propositions of law as a certainty, every correct proposition being modified by some misleading and improper modification thereof, and submitting to the jury questions of fact upon which there was no issue or no evidence or conflict, are certainly erroneous and misleading.

No stronger case was ever presented to a court showing the reasonableness of the Oklahoma statute, and it seems to counsel that for the errors above pointed out in these instructions the case should be reversed.

The defendant also requested the court to give to the jury certain instructions, numbered from 1 to 19, inclusive, pages 221 to 231, of the case-made. Instructions numbered 1, 4, 5, 6, 8, 10, 11, 13, 14, 16, 17, 18, and 19, (printed record pages 212 to 218, inclusive), are pertinent to the case and are as follows:

"INSTRUCTION No. 1.

"*Requested by Defendant.*

"You are instructed that the plaintiff in this case has failed to prove a cause of action in favor of the plaintiff and against the defendant. You will, therefore, find for the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 4.

"*Requested by Defendant.*

"You are instructed that the undisputed evidence in this case shows that the plaintiff successfully alighted from the train on which he was a passenger with his mother without injury and that so far as plaintiff was concerned the contract of carriage be-

tween the plaintiff and defendant was successfully completed, and if the plaintiff was injured, while attempting to board the train you will find for the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 5.

"Requested by Defendant.

"If you find from the evidence that the defendant failed to call the station and failed to properly light the station platform, and further find from the evidence that the plaintiff was alighted from said train without injury to himself the negligence of the defendant in failing to call the station or properly light the platform cannot be said to have been a violation of its contract of carriage or the proximate cause of the injury, and will find for the defendant.

"Refused and excepted to by the defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 6.

"Requested by Defendant.

"If you find from the evidence that the defendant failed to announce the station, and further find that the defendant's train did not stop at the station long enough to enable plaintiff and his mother to alight therefrom, and you further find that when plaintiff and his mother reached the platform for the purpose of alighting that the train was in motion and that the platform was dark and the plaintiff and his mother could not see, the plaintiff or the mother of plaintiff would not be justified in handing the plaintiff off the train or in attempting to have the plaintiff placed back on the train while the same was in motion, and you will find for the defendant.

"Refused and excepted to by the defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 8.

"Requested by Defendant.

"A railroad company, while it is bound to give a passenger a reasonable time and a reasonably safe place to alight, is not bound to assist its passengers in entering or leaving its cars. Such assistance cannot be claimed as a matter of right, unless the passenger is sick, infirm, blind or aged, and known to the railroad company to be such. The evidence in this case does not show that the plaintiff or his mother would come under the above exceptions.

"Refused and excepted to by the defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 10.

"Requested by Defendant.

"You are instructed that the fact of an accident or an injury having taken place in which plaintiff was hurt raises no presumption of negligence on the part of the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 11.

"Requested by Defendant.

"You are further instructed that if you find from the evidence that the defendant failed to announce the station of Edmond and further find from the evidence that the defendant stopped the train at said station a reasonable time for passengers to get off and on the train and that the said train was stopped at a place where a suitable platform was provided for entering and leaving the train, and you find further from the evidence that the said train had a baggage car and carried the baggage of its passengers and that the defendant had a truck on the platform at the said baggage car which said truck was left on the platform

at a place where passengers were not required to enter or leave the train, you are instructed that the leaving of such truck upon the platform at said place, not intended or necessary for the use of passengers in alighting from or entering the train, such action on the part of the defendant was not negligence, and if you find from the evidence that after plaintiff had alighted from the train his mother requested the bystanders to put him back on the train, the train then being in motion, and a stranger not in the employ of the company undertook to put the plaintiff on the train and followed the train while it was in motion, running for a distance of one hundred feet or more, and struck against the truck which was in a proper place, you will find for the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 13.

"Requested by Defendant.

"The court instructs the jury that a railway company has the right to presume that passengers will only attempt to get on and off its cars at the places designated by the company for such purpose, and it is not the duty of the railroad company to keep its tracks or platforms clear for those who may see proper to pursue the cars while leaving a depot or station.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 14.

"Asked by Defendant.

"The court tructs the jury that if you find from the evidence that plaintiff, Samuel Calhoun, at the time of the injury was an infant of tender years, to-wit, three years of age or less and you further find from the evidence that his mother, Anna Calhoun, purchased from the defendant at Arkansas City, Kan-

sas, one ticket for herself to Edmond, Oklahoma, and that under the rules of the railway company, she was permitted to take with her without extra charge, her infant son, the said Samuel Calhoun, plaintiff herein, then the railway company had the right to presume that the said Anna Calhoun would properly care for and guard the said child from danger; and if you further find that the said Anna Calhoun without the knowledge of the servants of the railway company attempted to alight from said train while in motion and handed plaintiff off from said train while in motion to a stranger, and because of the fact that said train was in motion at that time at such a rate of speed that the said Anna Calhoun on account of her own personal safety refused to alight, and while said train was so in motion requested or permitted the said Carl Jones to attempt to place plaintiff back on the train then such conduct on the part of the said Anna Calhoun would constitute negligence that would preclude the plaintiff from recovering in this action even though you should find that defendant's servants failed to call said station of Edmond upon the approach of said train and failed to light the platform of said station, and even though you should further find that the leaving of said truck on the platform at the place where the same was left was negligence on the part of the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION NO. 16.

"Asked by Defendant.

"The court at the request of the defendant has submitted to you certain special questions of fact for you to answer, and you are instructed that it is your duty to answer each of these questions fairly as you shall find the truth to be under the evidence and without regard to your general verdict.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 17.

"Requested by Defendant.

"You are further instructed that if you find from the evidence that the defendant failed to announce the station of Edmond and further find from the evidence that the defendant stopped the train at said station a reasonable time for passengers to get off and on the train and that the said train was stopped at a place where a suitable platform was provided for entering and leaving the train, and you further find from the evidence that the said train had a baggage car and carried the baggage of its passengers and that the defendant had a truck on the platform at the said baggage car which said truck was left on the platform at a place where passengers were not required or expected to enter or leave the train in question you are instructed that the leaving of such truck upon the platform at said place not intended or necessary for the use of passengers in alighting from or entering the train, such action on the part of the defendant was not negligence, and if you find from the evidence that after plaintiff had alighted from the train a stranger not in the employ of the defendant without the knowledge or consent of the defendant undertook to put the plaintiff on the train and followed the train while in motion, running for a distance of one hundred feet or more, carrying the plaintiff, under such circumstances that a reasonable prudent person ought to have recognized the danger, and ran against such truck, which caused the injury, you will find for the defendant.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 18.

"Requested by Defendant.

"The court instructs the jury that in determining whether the act of the defendant complained of is the

proximate cause of the injury the legal test is: Was the injury of such a character as might reasonably have been foreseen or expected as the natural result of the act complained of. A party is not chargeable with responsibility for results which do not naturally and reasonably follow as the consequence of his conduct; as a matter of law a party cannot be held responsible for injuries which could not reasonably have been foreseen or expected as the result of his conduct.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

"INSTRUCTION No. 19.

"*Asked by Defendant.*

"The court instructs the jury: That where witnesses have testified that they did not hear, or that certain words were not spoken at a certain time or place, such testimony is what is termed in law as negative testimony and that such testimony is not entitled to as much weight or consideration at the hands of the jury as the testimony of equally credible witnesses who testify to having heard such words spoken on such occasion, such testimony that the witness did hear being what is termed by the law positive or affirmative evidence.

"Refused and excepted to by defendant.

"B. F. BURWELL, *Judge.*"

These instructions correctly state the law, and are separately stated and numbered, and are not in any way sufficiently covered by the instructions given by the court.

The court in refusing each of said instructions committed reversible error.

That such instructions properly state the law we respectfully refer to the authorities cited under the third head of this brief.

II.

The Supreme Court of the Territory erred in sustaining the ruling of the trial court in overruling the motion of the defendant to set aside the findings of the jury to certain questions of fact submitted to the jury Numbered 12, 14, 39, 42 and 44, the same not being suported by sufficient evidence. (Specification of error No. 24.

"SPECIFICATION OF ERROR No. 24.

Special question numbered 12, submitted to the jury and the answer thereto (printed record page 226), is as follows:

> "Q. 12. Did one of defendant's employees call the station before the train stopped at Edmond station?
>
> "Answer. It was not called."

The testimony is as follows:

J. W. Rodkey, (printed record page 86), testified as follows:

> "Q. Had you heard the station announced in that car, up to that time?
>
> "Answer. I did not.
>
> "Q. Was that station called or announced in that car at that time or before this?
>
> "Answer. I didn't hear it called."

Henry Dull, (printed record page 98), testified as follows:

> "Q. Had the station been called in the car you were in?
>
> "Answer. No sir."

Which is only equivalent to saying he did not hear the station called.

D. A. Talbot, (printed record pages 115 and 116), testified as follows:

"Q. Did the porter or brakeman or any of the train crew call the station of Edmond as you approached it, in the car that you were riding in?

"Answer. They did not."

J. S. Dow, (printed record page 130), testified as follows:

"Q. Did you observe whether the porter or any other member of the train crew called the station as you approached Edmond?

"Answer. No, I did not hear them.

"Q. Was the station called by the porter or any member of the train crew in the car where you were riding?

"Answer. I did not hear them."

Anna Calhoun, (printed record page 136), testified as follows:

"Q. Was the station called as you approached it?

"Answer. The station was not called.

"Q. How do you know that, Mrs. Calhoun?

"Answer. Because I was listening for it."

Elmer B. Kennedy, porter on the train, (printed record page 166), testified as follows:

"Q. State whether or not the station was called the night on which you have testified you were train porter going into Edmond?

"Answer. Yes, sir.

"Q. In which cars, if any, were the stations called?

"Answer. In the smoker and day coach.

"Q. Did you see the lady who got off at Edmond that evening with a child?

"Answer. Yes, sir."

C. R. Setford, (printed record page 176), testified as follows:

"Q. Were you on that coach when they pulled into Edmond?

"Answer. Yes, sir.

"Q. Did you see any of the train crew in that coach as the train was approaching Edmond?

"Answer. Yes sir.

"Q. Now, where was it with reference to the time the train stopped—when was it, I mean?

"Answer. I should judge about half a mile out, maybe not quite so far.

"Q. Who was it that came through?

"Answer. I seen the conductor coming through —going one way and the porter going the other.

"Q. Now you may state what, if anything, the porter did as he went through?

"Answer. Why, I didn't hear him say anything; I heard him call the station.

"Q. Well, that is exactly what I want to know; did he call that station?

"Answer. Yes sir.

"Q. In that coach?

"Answer. Yes sir."

E. K. Bryant, (printed record page 184), testified as follows:

"Q. Did you see the train porter about the time the train was pulling into Edmond?

"Answer. Yes sir.

"Q. Where was he when he called the station?

"Answer. Well, he was near the end of the car I was in.

"Q. Was he on the inside of the car?

"Answer. Yes sir.

"Q. That is, inside of the part of the car where the seats were?

"Answer. Yes sir.

"Q. Where did he go after he called the train?

"Answer. He passed through and I didn't notice after.

"Q. Did you see Mrs. Calhoun and this little boy get off?

"Answer. Yell, I seen them come up by me where I was sitting."

J. T. Riley, (printed record pages 185 and 186), testified as follows:

"Q. Do you remember of the train stopping at Edmond?

Answer. I do.

"Q. Did you hear that station called?

"Answer. I did.

"Q. Do you remember who called it?

"Answer. The porter.

"Q. The train porter?

"Answer. Yes sir.

"Q. Where were you in the train?

"Answer. I was sitting behind—that is, north of the division of the arch, in that double seat.

"Q. Did you see Mrs. Calhoun and the little boy, the plaintiff in this suit?

"Answer. I saw a lady and a little boy."

Again, in cross-examination, (printed record pages 188 and 189), the witness says:

"Q. How far behind them were you?

"Answer. I was just the next seat behind the combination

"Q. Then they were only three or four seats from you?

"Answer. Yes sir.

"Q. Were they in plain view of you?

"Answer. They were.

"Q. And you heard the porter call the station at the front part of the car?

"Answer. I did.

"Q. Where was he from you when he called it the second time?

"Answer. He was right then near my left.

"Q. Was he north or south of you?

"Answer. He was east of me.

"Q. East of you and right by you?

"Answer. Yes sir, right near the back of the seat.

"Q. You are sure you heard him while he was at the front?

"Answer. I did.

"Q. And you heard him while he was standing there by you?

"Answer. I did.

"Q. Did he stop somwehere there?

"Answer. He did; he stopped long enough to turn around and go back."

R. A. Bryant, (printed record pages 190 and 191), testified as follows:

"Q. Was the train's arrival at Edmond announced that night, or called—was the name of the station called?

"Answer. Yes sir.

"Q. Who called it?

"Answer. Why, the porter came through and called the station.

"Q. Where was he when he called the station?

"Answer. Well, when I heard him call the station, he came through the car that I was in, and called it; first he came into the south end of the car, and went on back—

"Q. Did he call it inside the car where the seats were?

"Answer. Yes.

"Q. Did you hear him call it again?

"Answer. Yes, he called it in the rear end of the car some place; I didn't look around.

"Q. But you heard it?

"Answer. Yes sir.

"Q. Now, did you see the woman and the little boy start to get off?

"Answer. There was a lady and a small boy come along about where I was sitting—I was sitting the—I think near the end—near the end seat."

The only employee witness was the porter, Elmer B. Kennedy. The other witnesses were passengers on the train who heard the station called.

It is doubtful under the law whether there was even a conflict of evidence on this point.

Baltimore & O. R. Co. *vs.* Baldwin, 144 Fed. Rep. 53.
The Lizzie Henderson, 20 Fed. Rep., 524.
Horn *vs.* Baltimore & O. R. Co., 54 Fed. Rep. 301.
Opinion of Justice Miller in Stitt *vs.* Huidekopers, 17 Wall. 393 and 394.

It is apparent that the trial court as well as the supreme court of the Territory did not properly apply the law to the evidence in the case.

Special question numbered 14 submited to the jury and the answer thereto (printed record page 226) is as follows:

"Q. 14. How long did the train stop at Edmond before the accident to plaintiff occurred?
"Answer. One minute."

The following witnesses testified on this point:

Callye Grigsby, (printed record page 54), testified as follows:

"Q. How long did the train stop at Edmond that night?
"Answer. About three minutes, I suppose."

M. Fulton, (printed record page 62) testified as follows:

"Q. How long did the train stay there that night?

"Answer. When the train came in Judge Dilley and I made for the car to get on, and we had to hustle pretty lively to get on before it started."

E. S. Vaught, (printed record page 68) testified as follows:

"Q. How long did that train stay there that night, Professor, the first time?

"Answer. Well, the train started before I took my seat.

"Q. If I understand you, you got on immediately after it came in?

"Answer. Yes sir.

"Q. Have you any idea as to how long it remained?

"Answer. Well, I should say not more than a minute, perhaps a little longer than that."

Henry Dull, (printed record page 103), testified as follows:

"Q. How long did the train stop at Edmond, Mr. Dull, according to your judgment in the matter?

"Answer. I would judge thirty minutes.

"Q. Stopped thirty minutes?

"Answer. Yes sir.

"Q. That included the accident and all?

"Answer. Yes sir.

"Q. How long did it stop when it first stopped?

"Answer. The first stop?

"Q. Yes?

"Answer. About three minutes.

Again, (printed record page 108), witness says:

"Q. How long did you say the train stopped at Edmond, the first stop?

"Answer. About three minutes, I judge."

Clarence Walker (printed record page 111) testified as follows:

> "Q. How long did the train stop at Edmond that night?
> "Answer. Well, it wasn't over two minutes, I should judge."

D. A. Talbot, (printed record page 117) testified as follows:

> "Q. About how long did the train remain standing at Edmond when it first stopped?
> "Answer. Probably a minute and a half or two minutes."

J. W. Rodkey, (printed record pages 94 and 95), testified as follows:

> "Q. How long after you got off was it before Mrs. Calhoun appeared on the steps of the platform of that car, with the plaintiff?
> "Answer. Well, it must have been about four minutes, I should think, when the train began to start —to move.
> "Q. Four minutes you think?
> "Answer. From the time I got off.
> "Q. It was four minutes then from the time you got off until you saw Mrs. Calhoun upon the platform of that car with the plaintiff—the baby?
> "Answer. Yes, something like that."

Again, (printed record page 120) the witness testified:

> "Q. When you saw her appear on the platform and hand the child off to somebody, it was about four minutes—I understand you to say, from the time that you got off the train?
> "Answer. Yes, about three or four minutes."

Roy Mayall, (printed record page 121), testified as follows:

"Q. How long did the train stay at Edmond at this first stop?

"Answer. About three minutes, I should judge."

M. Yowell, (printed record page 125), testified as follows:

"Q. About how long in your opinion did the train stop at Edmond that night?

"Answer. I should think they were there about five minutes."

J. G. Jackson (printed record page 152) testified as follows:

"Q. And then what?

"Answer. I stayed at the head end just a few minutes and went to the baggage car—

"Q. About how many minutes?

"Answer. About a minute.

"Q. About a minute at the head end of the smoker and then went to the baggage car?

"Answer. Yes sir.

"Q. What did you do there?

"Answer. I stayed there and superintended the loading of the peaches.

"Q. About how long did that take you?

"Answer. About three minutes.

"Q. Then what did you do?

"Answer. Cried, 'All aboard.'

"Q. Then what did you do?

"Answer. Looked up and down the train and seen that everything was clear, and gave the signal."

J. A. Benfer, (printed record page 158), testified as follows:

"Q. Now, from the book, you may refresh your memory and state when the train arrived at Edmond?

"Answer. It arrived at 11:34.

"Q. Now, from the book, you may refresh your memory and state when the train left Edmond—that is, when it started out to leave Edmond before the accident?

"Answer. Well, we stopped there at 11:34 and laid there four minutes, and then we started out again."

This witness also testified that the train finally left Edmond at 12:07.

Elmer B. Kennedy, (printed record page 166,) testified as follows:

"Q. When the train arrived in Edmond on this day, state what you did after the train stopped.

"Answer. After I had called stations I went out on the steps of the day coach with my step box.

"Q. How long did you remain at this step?

"Answer. Until I was called by the conductor to help with the baggage.

"Q. How long was it?

"Answer. I stood there about three minutes.

"Q. After helping load the baggage where did you then go and what did you do?

"Answer. I then went up to the engine where two or three fellows were going to get on the blind and train started up and I put them off."

C. R. Setford, (printed record page 278), testified as follows:

"Q. How long, in your judgment, Mr. Setford, did the train stop at Edmond, when it first stopped until it started?

"Answer. From four to six minutes, I should judge."

E. K. Bryant, (printed record page 185), testified as follows:

"Q. In your judgment, how long had that train stopped before the accident?

"Answer. I think about five minutes."

J. T. Riley, (printed record page 186) testified as follows:

"Q. How long was it after the train stopped before they started, as you remember?

"Answer. Well, I think the train was there two or three minutes, or it might have been four for all I know; but it stopped the usual time."

R. A. Bryant, (printed record page 190), testified as follows:

"Q. Well, in your best judgment, Mr. Bryant, how long did the train stop at Edmond?

"Answer. Why, it seemed to me that it was at least five minutes anyway."

Yet the jury in the face of this evidence finds that the train stopped only one minute, and the supreme court expressly approves this finding. It would seem that the trial jury did not properly consider the evidence, and that the supreme court in the opinion does not fairly state or interpret the evidence.

The finding is certainly not supported by the evidence.

Special question numbered 39 submitted to the jury and the answer thereto is as follows:

"Q. 39. Was the truck left on the platform opposite where the baggage car was stopped in the train when it stopped at the station of Edmond to enable passengers to alight from and board the said train?

"Answer. No."

The testimony on this question is as follows:

J. W. Rodkey, (printed record page 90), testified as follows:

"Q. Now, where were those trucks situated at that time?

"Answer. Well, they were about three or four feet from the side of the train.

"Q. Three or four feet from the side of the train?

"Answer. Yes sir.

"Q. Now, with reference to the wooden part of the platform, where were the trucks located?

"Answer. Why, I think part of the trucks stood on the wooden part of the platform.

"Q. At which end of the platform?

"Answer. The south end."

Henry Dull, (printed record page 102), testified as follows:

"Q. Did you see the truck before the young man ran into it?

"Answer. No sir.

"Q. How far was the truck standing from the train at the time the young man struck it?

"Answer. The closest part was three feet I should judge.

"Q. At what angle with regard to the train, parallel or at some angle with it, at the time he struck it?

"Answer. I did not see it before he struck it."

* * * * * * * * *

Again (printed record page 102), the witness testified:

"Q. With reference to the wooden depot platform, was the truck on the wooden part or beyond it?

"Answer. Beyond it.

"Q. South of it?

"Answer. Yes sir.

"Q. Then your statement is that the accident occurred just south of the wooden platform?

"Answer. Yes sir.

"Q. Any steps there at the south end of that platform?

"Answer. It goes down gradual.

"Q. An incline?

"Answer. Yes sir."

Clarence Walker, (printed record page 112), testified as follows:

"Q. Now, with reference, Mr. Walker, to the tank and the depot, where was that truck?

"Answer. Well, it was on the south end of the platform and it must have been about 30 feet from the tank, probably a little more and twice that distance from the depot, and when I saw it, it was angling across the platform.

"Q. Now, if I understand you, it was thirty feet north of the tank?

"Answer. About that I should judge, and sixty feet south of the depot.

"Q. Was there a wooden platform there at that time?

"Answer. Well, there were heavy timbers there about eighteen inches wide, two of them, I should judge, and back of that there is gravel.

"Q. How much higher is the timber than the gravel?

"Answer. Well, I could not say that there is any difference, I never noticed them.

"Q. There is a step or incline from the timber to the gravel?

"Answer. I don't think so.

"Q. When you saw the truck how far from the train was it?

"Answer. Well, had the train been standing there one end of it could not have been more than three or four feet away.

"Q. Do you know whether that truck was on the board platform or the gravel platform?

"Answer. Well, the wheels were on the gravel part of the platform, while one end of the truck extended over the wooden platform."

J. A. Florence (printed record pages 169-170) testified as follows:

"Q. Now, when you got through with the baggage car what did you do with the baggage truck?

"Answer. Pulled it to one side.

"Q. How far did you pull it away from the train?

"Answer. About four feet.

"Q. Where was it with relation to the wooden part of the platform, and the commencement of the cinder part of the platform?

"Answer. The wheels of the truck were off on the cinders, and one end of the truck—the handles of it, protruded over the board platform.

"Q. And the screenings?

"Answer. Yes sir.

"Q. The screenings and the board platform ran side by side down to the cinders, and one end of the truck was over the cinders?

"Answer. Yes sir.

"Q. And possibly some over the board platform?

"Answer. Yes sir.

"Q. You pulled it away from the baggage car?

"Answer. Yes sir.

"Q. Where was that baggage car in the train?

"Answer. The second car.

"Q. The second car from the engine?

"Answer. Yes sir.

"Q. Where was it with relation to the smoker,—the second car from the smoker, was it?

"Answer. Yes sir."

This witness testified further that—

"After he had finished with the baggage car he went to the express car, loaded some peaches; took the

express truck and started up towards the depot and while he was pulling the express truck up he saw Carl Jones with the little child."

C. R. Setford, (printed record page 177), testified:

"When he first saw the truck the nearest part of the truck was four or five feet from the cars. He does not locate the truck with relation to the cinder or board part of the platform."

J. T. Riley, (printed record page 186), testified:

"That the truck was pretty close to the train but does not locate the truck as to the cinder or board part of the platform."

In this connection we desire to call the attention of the court to the stipulation between the parties (printed record pages 203 and 204), and to plat showing the station surroundings at Edmond, at the time of the accident (facing page 204 of the printed record.)

The court will note that as shown by this plat, which is agreed to be correct, the distance from the cinder portion of the platform to the corner of the depot is 76 feet; that the distance from the corner of the depot to the center of the bay-window, opposite where the south end of the car stopped for Mrs. Calhoun to alight, is 53 3-10 feet, making the distance from that point to the cinder portion of the platform a little over 129 feet.

The testimony of the witness, Florence, as to the location of the baggage car and where he left the baggage truck is absolutely undisputed and is corroborated by every witness in the case and the answer of the jury to this question is not supported by a grain of evidence.

Special questions numbered 41 to 44, inclusive, submitted to the jury and the answers thereto (printed record page 236), are as follows:

"Q. 41. Was the coach in which plaintiff and his mother were riding from Arkansas City to Edmond lighted?

"Answer. Yes.

"Q. 42. Did the lights in said car shine out through the windows of the car onto the platform?

"Answer. No.

"Q. 43. Was there a light in the bay-window of the depot?

"Answer. Yes.

"Q. 44. Did the light shine out onto the platform where persons would alight from and enter the car in which plaintiff and his mother were passengers from Arkansas City to Edmond?

"Answer. No."

Dr. Day, (printed record page 57), says:

"Q. What was the condition of the platform at the time you arrived at the depot, as to being lighted or not?

"Answer. There was no light on the platform at the depot when I arrived, except there was a little light there shining from the operator's lamp, from the bay-window of the station."

This witness did not arrive until after the accident and at this time the north end of the train was standing south of the water tank.

Miss Callye Grigsby, (printed record page 54), testified that "she was there before the train came in; at the north end of the depot platform." She testified that at that time it was dark. This witness however, did not notice the light in the bay-window of the depot or the light in the cars as they came in.

She was with a crowd of young people, who were evidently enjoying themselves.

R. M. Campbell, (printed record page 59), testified:

"Q. You say you got on at the south end of this coach?

"Answer. I think so.

"Q. You think that was the coach in which Mrs. Calhoun was riding?

"Answer. I think I stepped in the coach where the lady attracted my attention, but I may have gone into the other though; I would not be positive about it now.

"Q. Was that coach lighted?

"Answer. Yes sir.

"Q. The light in the bay-window shone out upon the platform, didn't it?

"Answer. Yes sir.

"Q. That coach was one of these nice long coaches?

"Answer. Yes sir, red plush seats.

"Q. Lighted with Pintsch gas lights?

"Answer. I don't know whether it was gas lights or electric lights; I think it was one or the other."

M. Fulton, (printed record page 62), testified that "before the train came in the platform was dark." He does not testify as to the condition of the platform or lights after the train came in.

Professor Vaught, (printed record page 68), testified that "the platform was dark before the train came in."

D. M. Dilley (printed record page 72), testified as follows:

"Q. What was the condition of the platform from the time you arrived there until the train arrived, as to whether or not it was lighted or dark?

"Answer. There were no lights outside of the lights, that I remember, in the depot, inside.

"Q. Do you remember where that light in the depot set?

"Answer. No, I do not.

"Q. What kind of a night was it, light or dark?

"Answer. It was a dark night, not so very dark night; it was what you would call a dark night; there was no moon; it would be an ordinary starlight."

Mrs. C. E. Vest, (printed record page 76), testified as follows:

"Q. What was the condition of the platform as to whether it was light or dark?

"Answer. My recollection is that there was just a light in the depot, but not on the platform; I don't remember of any light; I am pretty positive that there wasn't any."

Steve Haynes, (printed record page 82), testified that "before the train came in the platform was dark."

I. W. Rodkey, on cross-examination, (printed record page 92), testified:

"Q. You got off and got onto the platform north of the bay-window?

"Answer. Yes sir.

"Q. Did you notice whether the lights shone out of the coach onto the platform?

"Answer. I think there was some little light, yes, sir.

"Q. Do you remember whether the light shone out of the bay-window of the depot onto the platform?

"Answer. Yes, there was some light in the depot.

"Q. In the bay-window of the depot?

"Answer. Yes sir.

"Q. Shining out upon the platform?

"Answer. Yes sir.

"Q. You got off onto the platform?

"Answer. Yes sir.

"Q. And stopped there?

"Answer. No, I walked down a little ways after I got off."

Henry Dull, (printed record page 101), testified:

"Q. Were there any lights in the station anywhere?

"Answer. One light in the station.

"Q. Were there any lights in the office part of the station?

"Answer. That is where I mean.

"Q. Any light in the waiting room?

"Answer. I did not go into the waiting-room?

"Q. What kind of a light was there in the bay-window of the ticket-room, bright or dim?

"Answer. Bright enough for a man to work around in the room.

"Q. Did the lights, such as they were, give a good light or a poor light on the platform?

"Answer. I would consider it poor.

"Q. Could you see people distinctly and tell what they were doing?

"Answer. I should not have known the conductor only by the buttons on his clothes."

Roy Mayall, (printed record page 121, testified:

"Q. Was there a light in the bay-window?

"Answer. I think so, yes sir.

"Q. There was a light in the bay-window?

"Answer. Yes sir.

"Q. That bay-window has glass on three sides of it, so that the light standing on the table in the bay-window would shine out on the platform, would it not?

"Answer. Yes, it had lights on three sides."

Miss Loutella Hunt, (printed record page 123) testified that "it was dark before the train came in."

* * * * * * *

"Q. There was a lamp in the bay-window, wasn't there?

"Answer. Yes sir, I think so.

"Q. And all three sides of the bay-window were windows—glass, weren't they—so that the light would shine out?

"Answer. Yes sir.

"Q. Did you notice whether or not there were any lights in the coaches, as it pulled in?

"Answer. There were lights.

"Q. There were lights in the coaches?

"Answer. Yes sir."

J. G. Jackson, conductor, (printed record page 148), testified as follows:

"Q. Could you see down along the cars?

"Answer. Yes sir.

"Q. Were all the cars lighted on that occasion?

"Answer. Yes sir.

"Q. Was the smoking car lighted?

"Answer. Yes sir, it was a double car, a partition in it.

"Q. What kind of a car was it in which the plaintiff was riding?

"Answer. It was one of the big new cars, with an arch through the center of the car.

"Q. How was it lighted?

"Answer. Pintch gas.

"Q. Is that or not a good light?

"Answer. Yes sir.

"Q. How many of these lights was there inside of that car?

"Answer. There were six in the body of the car to the platform, and one on the platform.

"Q. There was one in the vestibule at each end?

"Answer. Yes sir.

"Q. One on the platform at each end?

"Answer. Well, the vestibule is the platform—the platform is the vestibule; there is one in the vestibule, the platform, and then there is a little aisle

there between the door and the body of the car—

"Q. There is one in there also?

"Answer. Yes sir.

"Q. So there were ten of these Pintch gas lights in the car?

"Answer. Yes sir.

"Q. And on the platform of the car?

"Answer. Yes sir.

"Q. Where is the light on the platform of the car with relation to the steps?

"Answer. Right over the steps.

"Q. Right over the platform from which the steps lead down?

"Answer. Yes sir.

"Q. And that was the kind of a car that you had that night, and that was the kind of a car that the plaintiff and his mother were riding in?

"Answer. Yes sir."

And again, at page 149:

"Q. Was there a light in the bay-window, do you know?

"Answer. Yes sir.

"Q. And lights from the cars?

"Answer. Yes sir.

"Q. Shining out on the platform?

"Answer. Yes sir."

J. A. Benfer, (printed record page 150), testified:

"Q. Now, as you were at the rear end of the train with your red light and with your white light as you call it, did you look down alongside of the train?

"Answer. Yes sir.

"Q. Could you see people on the platform?

"Answer. I could see people on the platform; the lights of the cars shone out on the platform so that I could see.

"Q. Did you observe a light in the bay-window of the depot?

"Answer. Yes sir.

"Q. And from the light in the bay-window of the depot and from the lights shining out from the cars, you could see persons down on the platform?

"Answer. Yes sir."

J. A. Florence, (printed record page 168), testified:

"Q. Did you have a light in the bay-window at that time?

"Answer. Yes.

"Q. At the time the train came in?

"Answer. Yes.

"Q. Describe that bay-window to the jury.

"Answer. Why, it is composed of three squares of windows.

"Q. Three sides of glass?

"Answer. Yes sir.

"Q. Did the light from that lamp shine out through that window onto the platform?

"Answer. Yes sir.

"Q. North, south and east?

"Answer. Yes sir.

"Q. The depot there is on the west side of the track, is it not?

"Answer. Yes sir."

This testimony shows that the place where passengers were required to alight from and board the train in question, was sufficiently lighted, at least no accident occurred on account of any want of such light.

III.

The supreme court of the Territory erred in sustaining the judgment and rulings of the trial court in overruling the demurrer of the defendant to the evidence of the plaintiff, in refusing defendant's request to peremptorily instruct the jury to find for defendant, in overruling the motion of the defendant for judgment on the findings of the jury, and in overruling the motion and amended motion of the defendant to set aside the verdict of the jury and to grant to the defendant a new trial.

(Specifications of error No. 1, No. 2, No. 4, No. 25, No. 26 and No. 27.)

This brings us to the consideration of the allegations of negligence set forth in the petition and the proof and findings of the jury and the right of plaintiff to recover under such allegations, findings and proof.

At the conclusion of plaintiff's evidence, the defendant filed its demurrer to the evidence in writing (printed record pages 144, 205 and 206), and at the conclusion of all the evidence defendant again requested the court to instruct the jury to return a verdict for the defendant (printed record page 212 and printed record page 11) and 12th and 13th grounds of amended motion for a new trial (printed record page 243).

Summing up the allegations of negligence contained in the petition, we find that the plaintiff relies upon the following:

(a) Failure to announce the station.

(b) Failure on the part of the porter to assist plaintiff and his mother from the train.

(c) Failure to have the depot platform properly lighted.

(d) Negligence in that the servants of the defendant had

placed and left a certain truck belonging to defendant and under its control near to said train and at the place of alighting therefrom at said station in a careless and negligent position, and standing diagonally to said train, and which it was impossible to see because of the darkness occasioned by the failure to light said lamps, and which was not in use or there for any lawful or necessary purpose, and which was there and in such position at the time of the arrival of said train at said station.

The supreme court of the Territory has devoted much time and space in discussing the doctrine of imputed negligence and in so doing have entirely overlooked and misapplied the true contention of plaintiff in error, that the negligence complained of, if any, was not the proximate cause of the injury.

That the weight of authorities is that the negligence of a parent or other person towards a child of tender years cannot be imputed to the child is unquestioned, but whether the injury is to a child or adult it is equally beyond doubt that the injury complained of in order to form a basis of recovery must be the direct and proximate result of the defendant's negligence and such an injury as should have been reasonably anticipated to have resulted from such negligence.

As to the failure to call the station and the failure of the servants of defendant to assist plaintiff and his mother to alight and all of the allegations of negligence is fully answered by the fact that the plaintiff did safely alight from the train. He was not injured in alighting from the train and none of the acts charged as negligence contributed to the injury.

As to the fourth claim of negligence, the leaving of the truck on the platform in proximity to the train, the undisputed evidence shows that this truck had been used for loading and unloading baggage. The jury find that the truck was seventy-five to one hundred feet south from the place where the south end of the coach stopped for passengers to alight from the

coach on which plaintiff and his mother were riding. It had been used by the servants of the company for the necessary purposes of its business and the evidence, in connection with the plat, shows that this truck was one hundred twenty-nine feet in fact from the place where the coach stopped for plaintiff and his mother to alight, and it was fully one hundred feet away from that portion of the train from which passengers entered the train and alighted therefrom. The baggage, mail and express coaches are as much a necessary part of the train as the passenger coaches. The carrying of mails, baggage and express is as much a part of the duty of the railway company as carrying of passengers.

The handling of baggage, mail and express requires the use of trucks. The railway company had no reason to expect that passengers would attempt to board the baggage, mail or express cars, or would attempt to board a train running at such a rate of speed as to make it dangerous to do so. It was not its duty to anticipate that any person would recklessly take their life in their hands and undertake to board a rapidly moving train at such a rate of speed as to make the attempt to board the train dangerous to life or limb. The jury found that the train was running at such a rate of speed as to make it dangerous to alight therefrom or board the train. This accident was caused by the intervention of Carl Jones, a third party, an independent, rational human agency, having no connection with the railway company, who negligently and recklessly took plaintiff from a place of safety and after his journey had been completed and he had alighted from the train in safety and ran with him for more than one hundred feet alongside of the rapidly moving train.

The testimony in the record in relation to this matter is as follows:

Testimony of I. W. Rodkey, (printed record pages 88, 89 and 90).

"Q. When did you first see Mrs. Calhoun after you got off the platform, if at all?

"Answer. Saw her on the platform—probably on the first step.

"Q. Did you see the plaintiff, Samuel Calhoun, at that time?

"Answer. Yes, they set the child right off, right opposite me there—close by me.

"Q. Do you know who it was that set the child off of the car platform?

"Answer. Not right at that time, I did not.

"Q. Did you see the party who did it?

"Answer. I saw him, yes sir.

"Q. Did you hear Mrs. Calhoun make any statement at that time to the party who was setting the child off of the car?

"Answer. No sir, I did not.

"Q. Well, why were you not able to tell who that party was?

"Answer. It was pretty dark and I could not see him.

"Q. Are you well acquainted with Mr. Robertson?

"Answer. Fairly well.

"Q. How close were you to him at the time that he handed the child off of the car platform?

"Answer. About six or seven feet.

"Q. Do you know to whom he handed it?

"Answer. No, I don't.

"Q. Did you see the party to whom it was handed?

"Answer. He was standing up close by me there.

"Q. How close to you?

"Answer. Oh, probably two feet.

"Q. Are you acquainted with Mr. Robertson's son?

"Answer. Yes sir.

"Q. You did not recognize him as the party to whom the child was handed, did you?

"Answer. No sir.

"Q. Well, now, what was done with the child

after it was handed down *on to the platform* of the depot, or rather, from the car platform?

"Answer. The boy picked the child up and tried to put it back on the train again.

"Q. What boy?

"Answer. Mr. Robertson's boy.

"Q. Mr. Robertson's boy picked the child up?

"Answer. Yes sir.

"Q. What did he do with it?

"Answer. He ran down the platform with it.

"Q. Now, do you know whether it was Robertson's boy or some other boy?

"Answer. No, it was Robertson's boy.

"Q. Do you know to whom Robertson's boy handed the child, if anyone?

"Answer. He told me when he returned that he had handed the child to Carl Jones; I asked him if he got the child on, and he said no, but that Carl Jones did.

"Q. Now, did you see Carl Jones attempting to put the child on the train?

"Answer. No, I did not.

"Q. Did you see any trucks around about there, Mr. Rodkey?

"Answer. Not at that time, I didn't.

"Q. When did you first see the truck?

"Answer. When I went down after the accident.

"Q. Did you see Mrs. Calhoun while this Jones boy was trying to put the child back on the train?

"Answer. No sir, the train was too far south for me to see him.

"Q. Did you hear Mrs. Calhoun make any statement to keep off the child or to put it back on the car platform?

"Answer. I think she hollered something but I didn't recognize what she said.

"Q. You don't know what she said?

"A. No.

"Q. Where was she standing at the time you heard her holler something?

"Answer. I think she was on the upper step of the platform; that is my recollection.

"Q. Well, now, when you first saw those trucks, how long after the accident was that?

"A. That was right immediately—it wasn't more than about a minute.

"Q. What first atracted your attention to the accident?

"Answer. I heard the child cry.

"Q. Do you know who picked the child up?

"Answer. I picked the child up and set it on the truck.

"Q. Now, where were those trucks situated at that time?

"Answer. Well, they was about three or four feet from the side of the train.

"Q. Three or four feet from the side of the train?

"Answer. Yes sir.

"Q. Now, with reference to the wooden part of the platform, where were the trucks located?

"Answer. Why, I think part of the trucks stood on the wooden part of the platform.

"Q. At which end of the platform?

"Answer. The south end."

* * * * * * * * * *

Again in cross-examination. (Printed record pages 92 to 96, inclusive.)

"Q. And you saw Mrs. Calhoun come down off from the steps—

"Answer. Well, she was on the platform, coming, on the first step.

"Q. Where was the boy at that time?

"Answer. They had set the boy off right beside me there.

"Q. Who had set the boy off?

"Answer. Well, I learned afterwards that it was W. W. Robertson.

"Q. When she handed the baby to W. W. Rob-

ertson, had the train started?

"Answer. Oh, yes, it was moving; it moved from the north end down to the bay-window.

"Q. The train had gone from the north end of the depot down to opposite the bay-window when Mr. Robertson took the baby?

"Answer. Yes sir.

"Q. Now, what did he do with the baby when he took it?

"Answer. Set it down on the platform.

"Q. Well, how far did he go with the baby when he set it down?

"Answer. About five feet, I should think.

"Q. You do not know who he gave it to?

"Answer. Well, he just set it down there; I think his boy took charge of it.

"Q. Did you hear what Mrs. Calhoun said to him when she handed him the baby?

"Answer. I did not.

"Q. Did you hear what he said to his boy when he placed the baby in his care?

"Answer. No, I did not.

"Q. Then you say that you heard Mrs. Calhoun say something?

"Answer. I heard her holler something, yes sir.

"Q. But you could not understand what it was?

"Answer. No sir.

"Q. Did you say anything to young Robertson about the baby?

"Answer. No, I think he came back there after he tried to—

"Q. Did you tell him to take the baby and try to put it on the train?

"Answer. No sir, I did not.

"Q. You are sure about that?

"Answer. You bet I am.

"Q. And you did not see Carl Jones have the baby at all?

"Answer. No sir.

"Q. Do you know where this truck was standing—how far it was from the bay-window?

"Answer. It was quite a little distance.

"Q. Something over 100 feet, is it not?

"Answer. Well, I should judge so.

"Q. Probably 125 or 30 feet?

"Answer. Something like that.

"Q. Then this Robertson boy and Jones together carried that baby down alongside of the train 125 or 30 feet before they reached the truck?

"Answer. Yes sir.

"Q. That is a fact, is it?

"Answer. Yes sir.

"Q. The train, as it started out, increased its speed, did it not?

"Answer. Yes sir.

"Q. Kept going faster and faster all the time?

"Answer. Yes sir.

"Q. Do you know why Mrs. Calhoun did not get off?

"Q. —After she handed the baby to Mr. Robertson?

"Answer. The train was going too fast for her to get off.

"Q. Did you hear her say anything about that?

"Answer. I did not.

"Q. Did you think that the train was going too fast for a passenger to get on or off at that time?

"Answer. Well, I could have got off, but I do not think that a lady could have got off.

"Q. —or for a boy like the plaintiff to get off?

"Answer. Oh no, he could not get off.

"Q. You say that it was going too fast for a woman to get off with safety when the train passed the bay-window?

"Answer. Yes sir.

"Q. She was then standing on the steps of the platform, or had she got off upon the platform?

"Answer. Well, she might be on the top step, and possibly on the platform, I could not say.

"Q. Did you see her there?

"Answer. Yes sir.

"Q. Sure of the fact that you saw her there?

"Answer. Yes sir.

"Q. And you saw her give that baby to somebody?

"Answer. Yes sir.

"Q. And you have since learned that it was Mr. Robertson?

"Answer. Yes sir.

"Q. And you were standing back of the platform?

"Answer. Of the depot, yes sir.

"Q. And she saw that the train was moving, did she not?

"Answer. I suppose so.

"Q. She could not help knowing it, could she?

"Answer. She could certainly feel the motion of the train.

"Q. Well, she could not help but see the objects that were standing on the platform?

"Answer. Yes sir, I suppose so.

"Q. Mr. Robertson was not an employee of the company?

"Answer. I think not.

"Q. His son, Walter M. Robertson, was not an employee of the company, was he?

"Answer. I think not.

"Q. Did you know Carl Jones at that time?

"Answer. Yes sir.

"Q. He was not an employee of the company, was he?

"Answer. Well, he was a checker on the train.

"Q. Checker for whom?

"Answer. For the Oklahoma Bus and Transfer Company.

"Q. That is an independent company to the railroad company, the bus and baggage company of Oklahoma City?

"Answer. I don't suppose it has anything to do with the railroad company.

"Q. Well, that is your understanding that it was not?

"Answer. Yes sir.

"Q. How long after you got off was it before Mrs. Calhoun appeared on the steps of the platform of that car, with the plaintiff?

"Answer. Well, it must have been about four minutes, I should think, when the train began to start —to move.

"Q. Four minutes you think?

"Answer. From the time I got off.

"Q. It was four minutes then from the time you got off until you saw Mrs. Calhoun upon the platform of that car with the plaintiff—the baby?

"Answer. Yes, something like that.

"Q. That is your best judgment, that it was about four minutes?

"Answer. Yes sir, something like that.

"Q. Now, what were you doing there that four minutes after you got off?

"Answer. Well, I was just standing there waiting, because the crossing was right down there, and I was going home then—

"Q. You lived on the west side of the track?

"Answer. I lived on the east side of the track.

"Q. Oh, yes, I beg your pardon, the train was east of you, and you lived on the east side of the track?

"Answer. Yes sir.

"Q. The track on which the train came in was on the east side of the depot?

"Answer. Yes sir.

"Q. (Producing plat). Mr. Rodkey, you are familiar with the conditions down there are you?

"Answer. Yes sir.

"Q. Please examine this plat; does that show that it is a pretty correct plat of the situation?

"Answer. I think so, yes sir.

"Q. This is the bay-window?

"Answer. Yes sir.

"Q. And this is the depot?

"Answer. Yes sir.

"Q. Now, is there a door north of the bay-window?

"Answer. Yes sir.

"Q. And another one south of the bay-window?

"Answer. Yes sir, the baggage door is south.

"Q. And the waiting room is north?

"Answer. Yes sir.

"Q. And the door into the waiting room is north of the bay-window?

"Answer. Yes sir.

"Q. Now, there is a par of the platform down along next to the—

"Answer. Yes, there is the plank.

"Q. Did that reach clear back of the depot, do you know?

"Answer. No sir, just a few feet.

"Q. And between that and the depot was what? —screenings?

"Answer. Screenings or something.

"Q. At the south end of the plank platform, and the screenings platform what was there there?

"Answer. Cinders is my recollection.

"Q. Now, that truck that you found was down here on the cinders, with one end projecting over the board platform of the cinder platform?

"Answer. Yes sir, about in here is my recollection of where the truck was setting.

"Q. That is about 125 or 30 feet from the bay-window, that place where the truck was setting, was it?

"Answer. I don't know but I should judge it to be about that far.

"Q. That is you best recollection?

"Answer. Yes sir."

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Testimony of Henry Dull (printed record page 99).

"Q. Did you go back in the train for your grip?

"Answer. I got it.

"Q. When you went back in the train for your grip did you see this lady, Mrs. Calhoun, and her child?

"A. I saw the lady come down the aisle and come towards the end of the car that I was getting off.

"Q. Did she come behind you or in front of you?

"Answer. Behind me.

"Q. You got off there?

"Answer. Yes sir.

"Q. Tell me what occurred there?

"Answer. When I stepped off the train I went over to the side of the depot and set my grip down—

"Q. Tell me what you did?

"Answer. I looked off to get my direction, and the train was started and while it was going this lady came to the next to the last step and handed the child to a boy on the platform, I do not know who the boy was. This boy handed it then to another fellow they call the check man.

"Q. Handed the child?

"Answer. Yes sir, and he hollowed at the lady something that I did not hear, as the train was going too fast for her to step off safely and she stayed on and the man ran then to hand the child back to her, clear off the platform. This man ran into one of those long baggage trucks, and the child fell out of his hand and went under the wheel of the car on the right hand side of the track. The man had to leave the child loose I presume, to save himself from going under.

"Q. Did the man fall with the child in his hands?

"Answer. Yes sir, he ran into the truck.

"Q. Did the man fall down?

"Answer. He fell down, not clear flat, but almost, caught the truck as one would.

"Q. And the child was dropped?

"Answer. Yes sir.

"Q. What occurred then?

"Answer. Its foot got under the wheel and by some means the wheel drew it up and threw the child off just a little. That man had great presence of

mind, and caught the child and drew it out, keeping the other wheels from running over it."

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And again, (printed record page 102).

"Q. Did you see the truck before the young man ran into it?

"Answer. No sir.

"Q. How far was the truck standing from the train at the time the young man struck it?

"Answer. The closest part was three feet I should judge.

"Question. At what angle with regard to the train, parallel or at some angle with it, at the time he struck it?

"Answer. I did not see it before he struck it.

"Q. When you observed it how was it?

"Answer. The railroad I think runs north and south. Should it run north and south it was standing at an angle of about thirty degrees.

"Q. Thirty degrees northeast and southeast?

"Answer. About forty degrees I should judge.

"Q. What was it, northeast and southwest, or southeast and northwest?

"Answer. Northeast and southwest.

"Q. Was the young man who was running with the child running along the train, near the car, close beside it, or at some distance from it?

"Answer. About four feet from it.

"Q. With reference to the wooden depot platform, was the truck on the wooden part or beyond it?

"Answer. Beyond it.

"Q. South of it?

"Answer. Yes sir.

"Q. Then your statement is that the accident occurred just south of the wooden platform?

"Answer. Yes sir.

"Q. Any steps at the south end of that platform?

"Answer. It goes down gradual.

"Q. An incline?
"Answer. Yes sir."

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Again in cross-examination (printed record pages 103, 104, 105, 106 and 107.

"Q. Then you alighted from the train right in front of the station?
"Answer. I did, yes sir.
"Q. Then was this lady attempting to alight from the same train from which you alighted?
"Answer. Yes sir.
"Q. Then she was right directly in front of the bay-window?
"Answer. Down a little bit south.
"Q. There was a light in the bay-window?
"Answer. Yes sir."

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"Q. Now, the car that you were in and also which Mrs. Calhoun and the child were in was brightly lighted, was it not?
"Answer. Yes, it had good lights.
"Q. Those lights shone out on the platform quite a ways?
"Answer. Well, they would light about half the platform.
"Q. How wide was the platform at Edmond?
"Answer. I would judge nine or ten feet.
"Q. Then the light shone out at least four or five feet from the train?
"Answer. Yes sir.
"Q. Well, now when this boy took the child and ran with it along the side of the train, was he running in that light or was he outside of the light? That is, was he more than five feet from the train or closer than five feet?
"Answer. Do you mean the boy?
"Q. This boy that carried the child.
"Answer. That was a man.
"Q. Well, then, the man?

"Answer. About four feet.

"Q. He ran about four feet from the train?

"Answer. Yes sir.

"Q. How far did he run with the child until he struck this truck?

"Answer. He ran the length from where the child was handed to him, somewhere near the front of the bay-window, to several feet off the wooden platform. As to that I cannot give an estimate of feet.

"Q. How close was he to the platform when he was running with the child?

"Answer. It looked as if he was trying to board the train or give the child to some one.

"Q. And was he close enough to this platform to hand it to any one?

"Answer. As to his intentions, I cannot state, but it appeared that he was trying to catch up with that end of the car where Mrs. Calhoun was standing to hand the child to her. That was my judgment of his intentions.

"Q. Did he catch up with her at any time during the time he was running?

"Answer. No sir.

"Q. Then he was not at the steps of the car?

"Answer. No sir, he did not catch it.

"Q. Well, now, I wish you would describe this truck, just describe it?

"Answer. Well, I could describe it so that you would understand it.

"Q. Describe it?

"Answer. It was a two-wheeled truck. That is it had two large wheels, regular express truck for small express. Not one of these four-wheeled trucks with a tongue to it. It had a wooden frame lined with iron, and one of this kind you can push and turn on the middle wheels, and had a balance to keep it from pushing over.

"Q. How long was it?

"Answer. Ordinary length of this kind of trucks.

"Q. Can you estimate it in feet?

"Answer. I should think they are eight feet long.

"Q. Then this was a truck about eight feet long with two large wheels on the middle?

"Answer. Yes sir.

"Q. And then two small wheels on each end?

"Answer. I do not know whether they were wheels or not.

"Q. How far from the ground is it probably to that truck; how high is the bed of the truck from the ground?

"Answer. I would judge about two feet. A little more maybe.

"Q A little under two feet?

"Answer. Yes, I should judge so.

"Q. Did you hear any of the conversation or any of the exclamations that Mrs. Calhoun made while the train was starting to move out?

"Answer. I head the noise, but I could not hear what she said.

"Q. Could you tell from the noise what she wanted?

"Answer. Her actions and the noise she made indicated that she wanted the child put back on the train. I could not tell after it had passed out in front of that bay-window. She would then be practically in the dark. Too dark to tell.

"Q. Now these lights on the platform were burning, were they. I believe that you testified that they were?

"Answer. Two lights, yes sir.

"Q. One on each end?

"Answer. Yes sir, light on each end.

"Q. Were they on the depot or platform?

"Answer. They were put up on the side of the depot.

"Q. And they were burning?

"Answer. They were burning but were not bright lights, these two were not.

"Q. What kind of a night was it, dark or moonlight?

"Answer. Cannot say; don't remember, whether it was moonlight or not.

"Q. Now, Mr. Dull, when this man was running with the child was he watching where he was going or was he trying to board the steps with this child?

"Answer. Well, that is a hard question to answer, but anyone would presume that he was watching both places. I should if I was in the same situation—would have tried to.

"Q. Well, there was sufficient light from this train, was there not, if one had been running along there, to see this truck?

"Answer. There was in case a man was paying pretty close attention. If the man had have been walking he perhaps would have seen it but all the lights he had were the lights coming out of the car.

"Q. The cars were brightly lighted were they?

"Answer. The car I was in at Edmond was lighted, the other ahead was not.

"Q. He was never ahead of that car?

"Answer. He never was.

"Q. He was running along beside that other car?

"Answer. Yes sir, the car we rode down there in.

"Q. That was the car directly back of the smoker?

"Answer. Yes sir, they were smoking in the car ahead.

"Q. Then you were in the second car in which there were passengers?

"Answer. I do not know what was ahead of the one I was in first.

"Q. Do you know whether there was a car back of that car or not, back of the car in which you came into Edmond?

"Answer. I won't say for certain but my judgment is that there was another car back of that.

"Q. Well, now, about how close from your ob-

servation was this man who was running with the child to the steps on which Mrs. Calhoun was standing while the train was moving out?

"Answer. I should judge half the length of the car.

"Q. Then he was about the middle of the car?

"Answer. I should judge he was.

"Q. And he was running about three feet from the train?

"Answer. About four feet from the train.

"Q. Well, now, there were steps back of the steps on which Mrs. Calhoun was standing, were there not?

"Answer. On the other end of the car you mean?

"Q. Yes.

"Answer. Yes sir.

"Q. How far was this truck from the steps where you alighted?

"Answer. That is a question that would be impossible to answer under the circumstances. I have had such short notice that I could not even make a guess at it.

"Q. Well, it was down below you several feet, a hundred feet or more?

"Answer. I could not say how far it was.

"Q. It was not anywhere close to where passengers came off the train, was it?

"Answer. I will answer your question if you tell me how long the platform is.

"Q. I wish to get your judgment.

"Answer. I don't want to give conflicting statements, and that is rather hard to answer.

"Q. When you got off the train at Edmond, you say you saw the conductor at the steps when you got off?

"Answer. He was on the platform.

"Q. How far from the steps when you got off?

"Answer. I judge about eight feet.

"Q. Did he have a lantern in his hand?

"Answer. Yes sir.

"Q. Did you see the porter there?

"Answer. I did not see the porter.

"Q. The brakeman?

"Answer. No sir, they were handling luggage.

"Q. How soon did you get off the train, after it had stopped at Edmond?

"Answer. About a minute, the first time I got off.

"Q. Did you see this child fall under the train?

"Answer. Yes sir.

"Q. How was the man carrying the child?

"A. He had hold of it about like this (indic.) out away from him, just like he was running to hand it to some one.

"Q. Holding it in both hands and out from his body?

"Answer. Yes sir, not very far out from his body.

"Q. He was holding it in both hands directly in front of him?

"Answer. Yes sir.

"Q. And running along?

"Answer. Yes sir.

"Q. He was running fast, was he?

"Answer. He was going about as fast as he could conveniently go."

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Testimony of D. A. Talbot in cross-examination (printed record pages 117, 118 and 119.)

"Q. Was the train moving or standing when Mrs. Calhoun was getting off, or attempting to get off?

"Answer. It was moving.

"Q. Where was Mrs. Calhoun when the train first started to move?

"Answer. She was approaching the door.

"Q. She had got out on the platform, then, when the train started to move?

"Answer. No sir."

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"Q. Did you see the child when it was attempting to be put back on the car?

"Answer. No sir.

"Q. Then your recollection is that the train was moving at the time Mrs. Calhoun was leaving the train?

"Answer. Yes sir, the train was standing still when she started from where she sat to door, but the train started to move before she reached the door."

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Testimony of M. Yowell, (printed record page 125.)

"6Q. State whether or not you saw Mrs. Calhoun and the little boy before they left the car at Edmond?

"6A. Yes sir, I saw them before they left the car.

"7Q. As they were leaving the car?

"7A. Yes sir, as they were leaving the car.

"8Q. Were you on the same car with those people?

"8A. Yes sir.

"9Q. About what time of night was it Mr. Yowell?

"9A. I guess it was long about midnight, I would not be positive what time of night it was.

"10Q. About how long in your opinion did the train stop at Edmond that night?

"10A. I should think they were there about five minutes.

"11Q. State all the facts and circumstances, as you remember them, attending the action of this lady and the little boy in leaving the car?

"11A. They come down the car and enquired if it was Edmond and we told her that it was and she went on out of the coach, and about the time she got to the door the train started.

"12Q. Did she leave the coach immediately when it stopped or just before it was leaving?

"12A. Just before it was leaving, about the time she got to the door it started."

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And again in cross-examination, (printed record pages 127 and 128):

"Q9. You say the train started about the time that Mrs. Calhoun got to the door?

"A9. Yes sir.

"Q10. Was she carrying the child when she started to the door?

"A10. I think she was leading it.

"Q11. And the child was walking?

"A11. Yes sir.

"Q12. Whea she started to the door with the child, was she alone or was there some one with her?

"A12. I think there was another lady with her.

"Q13. What was the other lady doing?

"A13. Just walking along with her.

"Q14. Were they engaged in conversation?

"A14. Not that I heard.

"Q15. As a matter of fact, as she was going to the door, leading the child, another woman was walking along with her?

"A15. Yes sir.

"Q16. And she was going leisurely?

"A16. After she found out it was Edmond then she walked up pretty brisk.

"Q17. When she got to the door did you hear her say anything to anybody?

"A17. No sir.

"Q18. Did you or anybody say anything to her?

"A18. No sir.

"Q19. Well, now, you feel positive that about the time she got to the door the train had started?

"A19. Yes sir.

"Q20. You do not know then anything about the immediate circumstances surrounding the accident to the child?

"A20. No sir."

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Testimony of J. S. Dow, (printed record pages 129 and 130).

"Q. Did you see the lady and little boy as they were leaving the car at Edmond?

"Answer. Yes sir, I saw her as far as the door.

"Q. As she was leaving the car?

"Answer. Yes sir, she was coming out.

"Q. Was she carrying the child or was the child walking?

"Answer. I would not say positively, but I think the child was walking, but I would not say positive.

"Q. Did you see the woman and child?

"Answer. Yes sir, the lady she spoke to me.

"Q. Did she say anything as she was in the act of leaving the car?

"Answer. I was in the front part of the coach and as she came along she asked if this was Edmond, and I said yes ma'am.

"Q. Did she leave the car immediately when it stopped at Edmond?

"Answer. No sir.

"Q. About how long in your opinion did the train stop at the station?

"Answer. Well, I could not say, I should judge probably somewhere from two to five minutes. Of course, I could not say for certain.

"Q. At about what period of that stop did this lady start to leave the car?

"Answer. Well, I was in the front part of the coach but I was facing back you know, and I saw her about middle way of the car, and as she came along, she said, is this Edmond, and I said yes ma'am. Just as she got to the door it began to start, just began to move slowly, but it began to move. Just about the time she got to the door."

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Testimony of Mrs. Calhoun, (printed record pages 138 and 139):

"Q. Well, but when the train first stopped, did any one offer to assist you to get off?

"Answer. No sir.

"Q. Did any one take the child?

"Answer. The child was taken in the train.

"Q. Who took the child?

"Answer. I don't know.

"Q. Was it a man?

"Answer. A man.

"Q. That was when you first started to get off?

"Answer. Yes sir.

"Q. And was the child carried off ahead of you?

"Answer. Yes sir.

"Q. Was the child taken before the train started to move?

"Answer. Taken off the train?

"Q. No, was it taken from you?

"Answer. Yes sir.

"Q. About where were you when the train started to move?

"Answer. Near or at the door.

"Q. Of the train?

"Answer. Yes sir.

"Q. Was there any one else on the platform or on the steps?

"Answer. I think there were.

"Q. Where was the child at that time?

"Answer. In the arms of the man that was carrying him out.

"Q. When did you next see the child?

"Answer. After the accident—no—some one started to hand him back to me.

"Q. And what did you then do?

"Answer. I told him to keep back, I screamed as loud as I could, and he didn't pay attention; and then I motioned to him that way to keep back. (Motioning.)

WRITING CLOSE TO EDGE

"Q. And the next you saw him was after the accident?

"Answer. Yes."

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And again in cross-examination, (printed record pages 142, 143, and 144):

"Q. Now, you are also sure that in the car some genlteman took the child and walked out with it?

"Answer. Yes sir.

"Q. You are sure that you didn't carry the child through the car and ask somebody to take the baby?

"Answer. No, I didn't ask for assistance—and they took the child—

"Q. —took the child from you,—a person on the platform?

"Answer. Why, some one in the car too—

"Q. —no, I am talking about the platform.

"Answer. No, I didn't have him in my arms on the platform,—the child preceded me.

"Q. Where in the car did you give the baby to the gentleman?

"Answer. At or near the seat.

"Q. Where you were sitting?

"Answer. Yes sir.

"Q. Then you did not lead the child out?

"Answer. No.

"Q. Or didn't carry it out yourself?

"Answer. No.

"Q. And when you got to the platform, you didn't hand it off to somebody?

"Answer. No.

"Q. Well, the child was safely off the train?

"Answer. Yes.

"Q. Did you see it after it was off the train?

"Answer. I saw it in the arms of the gentleman.

"Q. Well, did you see the gentleman place it on the platform?

WRITING CLOSE TO EDGE

"Answer. No, I didn't see that; I saw him leaving with it.

"Q. And then you saw Carl Jones run along side of the platform?

"Answer. Yes.

"Q. With the child?

"Answer. Yes.

"Q. How was he carrying the child?

"Answer. Carrying him this way.

"Q. And do you remember of his saying to you about, 'Take the child,' or--

"Answer. No.

"Q. You don't remember hearing that?

"Answer. No.

"Q. Well, you still remained upon the platform?

"Answer. On the steps, on the steps.

"Q. Did you get down on the steps?

"Answer. Yes sir.

"Q. Which one of the steps were you on?

"Answer. I would not say—I could not say exactly.

"Q. Did you get down far enough so as to take hold of the rods on either side of the steps?

"Answer. That is the way I was holding.

"Q. And you got down that far and stayed there at that time?

"Answer. I remained.

"Q. Then you didn't see him run against the truck, did you?

"Answer. No sir.

"Q. Why didn't you get off, following the gentleman who took the baby?

"Answer. The train seemed to get in motion between the child leaving and—

"Q. —Well, the train was in motion, I understand you to say, when you got to the door?

"Answer. Yes, but the child was ahead of me.

"Q. Well, I say, why didn't you get off?

"Answer. I was afraid to risk getting off a moving train.

DATA CUT OFF

"Q. And that was the reason you did not get off?

"Answer. Yes sir."

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"Q. Why did you call to Mr. Jones to 'keep back?"

"Answer. Why, it looked perilous, it looked to me that the child was in peril.

"Q. And that it was?

"Answer. Yes.

"Q. To try to put him back on in that way?

"Answer. Yes.

"Q. And that is what you thought about it?

"Answer. Yes.

"Q. You didn't know who the man was that you gave the child to?

"Answer. No, I didn't know him.

"Q. Did you afterwards learn who it was?

"Answer. Yes sir, I have heard people in the room here—

"Q. —Was it Mr. Robertson?

"Answer. I think it was, just from what I heard; I didn't know him at the time.

"Q. Have you met him since?

"Answer. I have not met him since.

"Q. Do you think now, that it was Mr. Robertson that you gave the child to?

"Answer. Yes sir, I think so.

"Q. Do you remember Mr. Robertson coming back after he got off the train with the child?

"Answer. I think he did.

"Q. And when he got on after he had taken the child off, he got on the platform of the next car south of you?

"Answer. I think that was the position—

"Q. You were riding on the south end of the coach in which you had been riding?

"Answer. Yes sir."

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Testimony of J. H. Florence, (printed record pages 170, 171 and 172):

"Q. Where was you when you first saw Carl Jones?

"Answer. He was opposite the door leading into the ticket office.

"Q. Opposite the door leading into the ticket office?

"Answer. Yes sir.

"Q. Was that north or south of the bay-window, the door leading into the ticket office?

"Answer. South.

"Q. The door was immediately south of the bay-window?

"Answer. Yes.

"Q. And he was opposite that door?

"Answer. Yes sir.

"Q. Now, what was he doing?

"Answer. Walking alongside the train.

"Q. Walking along, did he have hold of anybody?

"Answer. He had what I supposed to be a bundle.

"Q. A bundle?

"Answer. Yes sir.

"Q. Then what did you next observe?

"Answer. I next observed that it was a child.

"Q. Now, what was he doing as he was walking—was he running or walking?

"Answer. He first started out in a walk and as the train got faster he got faster.

"Q. And went along in a run?

"Answer. Yes sir.

"Q. Just describe his actions—just what he did?

"Answer. Well, as near as I can remember he had hold of the train with his left hand, the handle of the train, and the bundle in his right arm—or the child.

"Q. Now, just describe that, Mr. Florence, in your own way—describe it just as it happened.

"Answer. Well, he first began walking along with that in his arms, and the train kept getting faster and he got faster.

"Q. Well, did he try to put the baby on the train?

"Answer. Yes sir, it seemed as though—

"Q. Now just describe what he did.

"Answer. It seemed as though he was trying to put the baby on the train.

"Q. How many times did you see him try to put the baby on?

"Answer. I don't remember.

"Q. Well, as the train ran faster, did he still have his hand up holding to the rod?

"Answer. Yes sir.

"Q. All the time, as you remember?

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"Answer. I have told about it—

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"Q. How far did you see him walk or run?

"Answer. I should say it was 100 feet from where I saw him start.

"Q. At least 100 feet?

"Answer. Yes sir.

"Q. How far did he run; how far did he get with the baby?

"Answer. He ran to the end of the boards, along the edge of the track.

"Q. Then the train was increasing all the time?

"Answer. Yes sir.

"Q. Did you see anybody on the platform of the car—the day coach?

"Answer. Yes sir.

"Q. Who did you see there?

"Answer. I don't know who it was.

"Q. Was it a man or woman?

"Answer. I don't remember. I never noticed particularly.

"Q. Did you see anybody on the steps of the smoker?

"Answer. I think there was.

"Q. Was it a man or a woman?

"Answer. I could not tell.

"Q. Did you hear anybody on the steps of the day coach say anything?

"Answer. No sir.

"Q. Did anybody on the steps of the train appear to be paying any attention to Carl Jones when he was running along there with the baby?

"Answer. Yes, some one on the steps of the day coach, seemed as though they were trying to take it.

"Q. Seemed as though they were trying to take it?

"Answer. Yes.

"Q. Well, you could not tell whether it was a man or a woman?

"Answer. No sir, I never noticed.

"Q. You could not hear what they said?

"Answer. No.

"Q. Now, then, when did Carl Jones stop running?

"Answer. When he hit the truck.

"Q. How did you know that he hit the truck?

"Answer. I don't know that he did.

"Answer. I could see him when he stumbled, but I don't know that he hit the truck.

"Q. You were not right there?

"Answer. No sir.

"Q. Could you see the truck from where you were?

"Answer. I don't know, I never noticed it.

"Q. You never noticed it but you saw him fall?

"Answer. Yes sir.

"Q. Did you hear the baby scream there?

"Answer. Yes sir.

"Q. The train was then in motion?

"Answer. Yes sir.

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"Q. Was the train in motion when you saw Carl Jones?

"Answer. Yes sir."

"Q. Was it then going faster and faster all the time?

"Answer. Yes sir."

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Testimony of C. R. Setford (printed record pages 176, 177 and 178):

"Q. Now, Mr. Setford, I wish you would describe in your own way just what you saw the woman do and the little boy do, if anything, from the time that the porter called the station until after the accident?

"Answer. Well, I never knowed the lady was on the train until she got up and started for the door and asked if this was Edmond, and some one said 'Yes,' and then she went on out towards the door, and I felt kind of uneasy—

"Q. —Well, did she have the boy with her at the time, as she went out of the door?

"Answer. It appears to me as though she was leading the boy or pulling it in front of her; I could not say for sure; there was some lady with her carrying a grip behind her—

"Q. Now, go on and describe just what you saw?

"Answer. She went on out of the door, and then I looked out of the window, stuck my head out to see that she got off all right, and some gentleman took the boy and I think, set it down on the platform, and the train started along about then sometime, and this man ran and jumped on the train again, and she hollered for her baby, and somebody took the baby up and started to put it on the train,—I didn't know who it was at the time—I watched right out of the window—I was right over the gentleman that had the baby; he tried to hand it up on the car, and said—hollered pretty loud two or three times, 'take it, take it,' and he struck the truck; I think he had the baby in one hand and was holding to the railing with the other; and as near as I could see, it throwed his arm

right back and throwed the baby under the car; I heard the baby cry, and jumped up and jerked the bell rope, and I made the remark to a couple of fellows along with me—

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"Q. Well, as Mr. Jones was running alongside of the train, or the party with the baby was running alongside the train, just explain to the jury how the train was going?

"Answer. Oh, it wasn't—when he struck the truck, he was going just about as fast as he could run I believe, very nearly; if the gentleman had the child he might have—

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"Q. Could you see how far that truck was from the edge of the cars?

"Answer. I could not when I was on the train; after I got off I should judge about four feet, four or five feet, somewhere along there.

"Q. Four or five feet between the nearest part of the truck and the cars?

"Answer. Yes sir.

"Q. When the train stopped the first time Mr. Setford, state if you know where the south end of that day coach in which you were riding set, with reference to the bay-window of the depot?

"Answer. Just about even.

"Q. Did you notice any light in the bay-window?

"Answer. Why, I didn't then, no. I don't believe I did.

"Q. I believe you testified that the car was lighted?

"Answer. Yes sir.

"Q. How long, in your judgment, Mr. Setford, did the train stop at Edmond, when it first stopped until it started?

"Answer. From four to six minutes, I should judge.

"Q. And where would you say now that Mrs. Calhoun and the baby, the plaintiff, were at the time that the train started to move?

"Answer. Why, she was quite close to the door, probably out on the platform.

"Q. Did any gentleman come into the seats and pick that child up?

"Answer. I think not; if the child was taken by a gentleman, I didn't notice it, only after he got outside the door.

"Q. Just describe how that child got off of the train and on to the platform, as you saw it?

"Answer. Well, there was a gentleman took it off.

"Q. Where did he come from?

"Answer. I can't say whether he came from the train or from over on the platform and somebody handed it to him, or whether he brought it off of the train himself.

"Q. Well, what did he do with it then, as you remember it?

"Answer. I think he set it down on the platform.

"Q. How far from the train?

"Answer. Oh, four or five feet.

"Q. Then what did he do after he set it down?

"Answer. He ran and jumped on the train again.

"Q. Do you remember what car he jumped on?

"Answer. I could not say he either jumped on the south end of the car that I was on, or the north end of the smoker next to it."

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Testimony of E. K. Bryant, (printed record page 184):

"Q. Did you see Mrs. Calhoun and this little boy get off?

"Answer. Well, I seen them come up by me where I was sitting.

"Q. Who was with them, if any one, at that time?

"Answer. Well, I think there was a lady and a little boy with them.

"Q. A lady and a little boy with her.

"Answer. Yes sir.

"Q. Well, the little boy is the plaintiff in this case?

"Answer. Yes.

"Q. How was the little boy getting to the door?

"Answer. I think, if I remember right, his mother was leading him.

"Q. How were they going to the door, as to being a hurry or not?

"Answer. Well, they didn't seem to be in any particular hurry.

"Q. Did you notice them having any grips?

"Answer. No sir, I could not say as to that.

"Q. Did you notice whether the lady with them had any grips or not?

"Answer. No sir.

"Q. Well, did you notice where they were at the time the train started?

"Answer. Well, they was out of my sight; I was sitting kind of leaning agen—the side of the car, and I could not see very well outside of the door.

"Q. Well, where were they, in your best judgment, now, about the time the train started?

"Answer. Well, I should judge they were on the platform.

"Q. Did you see any gentleman come in and pick up that child and carry it out?

"Answer. No sir.

"Q. They went right on past you?

"Answer. Yes sir."

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Testimony of J. T. Riley, (printed record pages 186 and 187):

"Q. Did you see Mrs. Calhoun and the little boy, the plaintiff in this suit?

"Answer. I saw a lady and a little boy.

"Q. Did you see them get off?

"Answer. No sir, I saw them start to the train —to the end of the car.

"Q. How long was it after the train stopped before they started, as you remember?

"Answer. Well, I think the train was there two or three minutes, or it might have been four, for all I know; but it stopped the usual time.

"Q. And where was the plaintiff and the little boy, or Mrs. Calhoun or the lady and the little boy, at the time the train started; as you now remember?

"Answer. They were in the aisle, they were sitting on the right hand side of the coach, that is, the west side of the coach, in front of the division; they were sitting on the same side of the car that I was sitting, and just as soon the train was starting, she wakened up to the fact, and asked the question if this was Edmond, and some one said 'Yes,' and she wanted to get off, and the little boy was running ahead of her to the end of the car, and then I—

"Q. —could not see them any more?

"Answer. —I put my head out of the window to see what the result would be, for I was fearful that there would be trouble in getting off—

"Mr. Howard: Never mind what you were fearful about. State to the jury what you saw.

"Answer. I saw some person take the child off, and then the train was going too fast for her to get off, and she said, give her her child, or 'give me the child,' and a man undertook—somebody—I don't know who it was.—to hand her the child—

"Q. Well, did you notice where the man came from that took the child off from the train, and what he did with the child?

"Answer. I don't know where he came from, but he placed it down and I think intended to help the lady off, but the train was going too fast for her to get off, and she spoke for her child, and a man grabbed it—grabbed up the child and tried to give it to her, but he ran against a truck, and the child fell from his arms and fell under the car.

"Q. Could you tell how far that truck was from the train?

"Answer. Why, I think that truck was pretty close to the train; I don't think it had been moved after it had been loaded—from the express car.

"Q. Or the baggage car?

"Answer. Or the baggage car.

"Q. The train stopped—

"Answer. —At Edmond?

"Q. At Edmond, you say two or three or possibly four minutes?

"Answer. Yes sir.

"Q. About how far in your judgment had the train run when this young man ran against the trucks?

"Answer. Oh, not very far, possibly 50 or 60 feet; it might have been more.

"Q. It might have been more?

"Answer. It might have been more; I am not sure as to that."

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Testimony of R. A. Bryant, (printed record page 191):

"Q. Now, did you see the woman and the little boy start to get off?

"Answer. There was a lady and a small boy came along about where I was sitting—I was sitting in the—I think near the end—near the end seat.

"Q. At what end of the car?

"Answer. The south end of the car facing the south and I noticed the lady and the little boy come back by where I was sitting.

"Q. Was there anybody with them?

"Answer. There was another lady with them, I think.

"Q. Was there a gentleman with her at the time, carrying the child?

"Answer. No sir, I didn't see any.

"Q. Do you know whether or not at that time

she was leading the child or whether the child was going ahead of her?

"Answer. I think she was leading the little boy or child, whatever it was.

"Q. Well, where were they when the train started?

"Answer. Well, I think the train started then; I think the train was in motion when they came down by where I was—or started about that time.

"Q. Did you hear the lady say anything?

"Answer. No, not to my recollection.

"Q. Did you hear any lady say anything coming from the car or on the platform of the car?

"Answer. No.

"Q. You didn't see either of them get off

"Answer. No sir.

"Q. You did not see the baby handed off?

"Answer. No sir.

"Q. You didn't hear her or any other lady say anything out on the porch or out on the steps of the car?

"Answer. Well, after the child had been put off it created somewhat of a commotion, and there was some talk there.

"Q. What did you hear?

"Answer. I heard some one say, 'Give me back my child,' or 'boy,' or something like that.

"Q. That was somebody who was out on the platform?

(No answer.)"

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Testimony of W. W. Robertson, (printed record pages 193, 194, 195, 196 and 197):

"Q. En route from Guthrie to Oklahoma City, did you see the child or its mother on the train?

"Answer. I saw the child and the person who I supposed to be its mother on the platform of the train.

"Q. What were they doing when you saw them?

"Answer. Mother was standing on the platform holding the child on first step coming down from the platform and asked if some gentleman would not take the child off.

"Q. Where were you standing or sitting when the train pulled into Edmond?

"Answer. I was standing on the outer platform on the steps going down from the platform ready to jump off as soon as the train checked up.

"Q. Did you do this?

"Answer. I did.

"Q. Whom did you meet if any one, when you got off the train?

"Answer. I met my son who had a package and also my mail for me and whom I was expecting to meet there.

"Q. Did you get off the car and go on to the depot platform that night?

"Answer. I did.

"Q. How long did you remain on the platform?

"Answer. I cannot answer that question definitely as to time; I passed a few words with my son, received my mail from him, told him goodbye, and started back to the train.

"Q. Was the train starting as you started back towards it?

"Answer. It was moving at that time slowly.

"Q. Before you got to Edmond, did you hear any of the employees of the railway announce the station?

"Answer. Sometime before reaching Edmond, I got up from my seat and went forward to the platform; I did not hear anyone announce the station, but it might have been announced as I was not in a position to hear it.

"Q. On the approach of the train to Edmond, if I understand you, you were on the platform of the coach, and not in it?

"Answer. I was; just as it neared the depot, I went down on the steps.

"Q. With reference to the platform upon which

you were standing, where was the smoker to that car?

"Answer. The next coach ahead of us, is my recollection of the matter."

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"Q. When the lady and child were on the platform of the car, what were they trying to do?

"Answer. From her remarks, 'Will not some gentleman help take the child off,' I suppose her intention was to get off the train.

"Q. To whom was the child handed, if any one, and by whom?

"Answer. The child was handed to me by the lady who I supposed to be its mother.

"Q. What did you do with it?

"Answer. I took the child off, ran back and handed the child to my son, and told him to hold the child.

"Q. Was the train moving at that time?

"Answer. It was."

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"Q. Mr. Robertson, when you first saw the mother and child on the platform of the car, state whether or not train was at that time in motion?

"Answer. It was.

"Q. On which platform of which car was it when you saw those two?

"Answer. My recollection is it was on the front platform of the coach just in the rear of the smoker.

"Q. Do you know whether the smoker was the first car from the engine which carried passengers on that train?

"Answer. I do not.

"Q. At the time the train came to a stop at Edmond the first time, do you know about where the engine stopped and about where the baggage car was relative to the station building at Edmond?

"Answer. My impression is that the engine was at that time at the tank taking water for same, but I cannot answer definitely.

"Q. Do you know whether or not—baggage car was the first car behind the engine?

"Answer. I don't guess I paid any attention to the location of the baggage car that night.

"Q. Mr. Robertson, from the time the train approached Edmond on that night, please state in your own way, all the facts connected with this accident up to and including a time when the train stopped for a second time after the accident occurred?

"Answer. I was on the train on which the lady and child came to Edmond, but desiring to go on through and expecting to meet my son on the station platform, I went out on the coach platform before we stopped at the station; I don't know whether anyone called the station in the car. I got off when the train stopped or rather just as the train was stopping and after getting a package and mail from my son, went back to the end of the coach. As I got to the steps, the lady was standing at the top of the coach platform; the train was moving out at that time, the lady said: 'Won't some one please take the child off?' I took the child off, handed it to my son and told him to hold it. When I had handed the child to my son, I ran back to the steps and learned the lady wished to get off also; I told her she could not do so as the train was running too fast; she was down on the steps; I heard some one behind me and looking back saw a man trying to put the child on the steps. I told him, Get back! get back! knowing it was too dangerous to try and put the child on. Just at this moment he struck a truck and I saw him reel and the child seemed to slip from his grasp. I then lost sight of him until the train made the second stop: I was where the trucks stood after the train stopped. I cannot say how long the train stood at the depot, was not in a position to hear Mrs. Calhoun say anything to anyone about putting the child back on the train. Believe it was the head end of the coach next to the smoker where the lady came out and the child was lifted off.

"Q. Where were you standing, on the depot plat-

form or on the rear step of the smoker when you first warned the lady, Mrs. Calhoun, to not attempt to get off the train?

"Answer. I was on the depot platform, and was starting to get on the steps where she was.

"Q. How did you warn her and in what way?

"Answer. After handing the child to my son, I returned to the steps and found her coming down the steps; I told her to not attempt to jump off, that the train was running too rapidly.

"Q. This was, as I understand you, directly after you had taken the baby from the mother, placed it in charge of your son, and returned running to the car?

"Answer. It was.

"Q. Did you at any time subsequently give additional warning to Mrs. Calhoun to not jump off?

"Answer. I did not.

"Q. When you warned her, did she desist from the attempt to dismount from the train?

"Answer. I cnnot say, as I hurried past her and climbed up the rear steps of the coach in front.

"Q. You do know, however, that she made no further attempt to get off the train?

"Answer. Do not know whether she made any other attempt to get off, but am satisfied she did not get off until the train made the second stop.

"Q. At the time you mounted the rear steps of the smoker, the train was moving quite rapidly, was it not?

"Answer. It was.

"Q. Too fast for a lady to mount or dismount?

"Answer. Yes sir.

"Q. You did not hear Mrs. Calhoun ask anyone to put her baby back on the train, did you?

"Answer. I did not.

"Q. When was it you next saw the baby directly after this?

"Answer. As I was climbing or going up the rear steps of the next coach, my attention was in some way attracted and as I turned I saw the baggage

man with the child trying to put the child back on the train; I hollooed to him, 'Get back, get back,' that the train was running too rapidly. Just about that time I saw him run against the truck and when he did so, it seemed to make him reel and to lose his hold of the child. I saw the child slip from him and I thought both of them fell under the train.

"Q. Did you have an opportunity to and did you observe how near the coach the baggage check man ran with the child?

"Answer. Yes.

"Q. Please describe in your own way?

"Answer. He made several attempts to hand the child on, each time coming as nearly as possible in front of the steps and then going out in a curve from the train and coming back in front of the steps.

"Q. How many such attempts, if you know, did the check man make to put the child on before he ran into the truck?

"Answer. I cannot answer definitely; two or three times, I think.

"Q. Was the check man running fast or slow, state approximately?

"Answer. He was running as rapidly as circumstances would permit.

"Q. As I understand you, the train at that time was running pretty fast and the check man until he struck the truck, managed to keep up with the train, did he not?

"Answer. The speed of the train had materially increased. When he struck the truck he was slightly back of the platform, but was at that time making an earnest effort to catch up with the platform in order that he might make another effort to hand the child on. Just before he struck the truck he had made an unsuccessful effort to put the child on and had fallen behind the platform; then it became necessary to make another run to catch the platform and before reaching the platform he struck the truck.

"Q. Is it not true this check man was running

as fast as a man could, situated as he was on this occasion?

"Answer. He was doing his best to put the child on, but I cannot answer as to his speed.

"Q. Is it not true, that the attention of the check man was solely directed to placing this child on the car platform?

"Answer. I think that was the case; at the same time, curves made by him shows he was aiming to be thoughtful as to his surroundings.

"Q. Could you see where his eyes were directed?

"Answer. I could not; his attention was naturally directed to the platform.

"Q. You say he had just made one of these curves from the train when he struck the truck?

"Answer. He was making a curve coming to the train when he struck the truck.

"Q. You saw him strike the truck?

"Answer. I did.

"Q. What part of the truck did he strike?

"Answer. He struck one corner.

"Q. How was the truck standing, lengthwise, parallel with the track or not at the time the check man struck it?

"Answer. I cannot answer definitely; my recollection is that the corner of the truck which he struck was nearer the train than the far end of the truck from him.

"Q. Do you remember where this truck was located with reference to the platform of the depot at Edmond?

"Answer. I think the truck was near the end of the board platform."

* * * * * * * * * *

Testimony of Walter Melville Robertson (printed record page 201):

"Q. Now, when did you first see the little boy?

"Answer. When my father handed the child to me.

"Q. Now, just explain how your father got that child and how he handed it to you?

"Answer. Well, just as the train was leaving the station the lady and the little child came on the platform, and I think she said, 'Will some gentleman please help the child off;' and my father was just getting on the platform and he took the child, and handed it down on the platform to me; and he said: 'Keep the child and the train will stop and let the lady off' —

"Q. The—what did your father do?

"Answer. He started to get back on the train.

"Q. Did you see him get on?

"Answer. Yes sir, I think I did.

"Q. What car did he get on?

"Answer. He got on the car in front of the platform on which the lady was standing.

"Q. Now, describe in your own way what happened?

"Answer. Well, just then—I don't know whether the lady asked anyone to put the child back, but some one thought she did, and just then this boy, who I thought was a train official, came up and took the child and started to put the child on, and I watched him for a second; and he appeared to put the child on, and then I turned around and started away; I didn't see the accident.

"Q. You didn't see him further than his first attempt to put the child on the train?

"Answer. No, I thought that he put it on.

"Q. Do you know who that boy was?

"Answer. I afterwards learned it was Carl Jones."

* * * * * * * * * *

Findings of the jury (printed record page 227 *et sequens.*) questions and answers thereto are as follows:

"Q. 18. When plaintiff and his mother reached the platform of the car on which they were riding,

was the train then moving out of Edmond Station?

"Answer. Yes.

"Q. 19. When plaintiff reached the platform of said car, did his mother hand him to a bystander?

"Answer. She did

"Q. 20. To whom did the mother of plaintiff hand the plaintiff?

"Answer. W. W. Robertson.

"Q. 21. If you say she handed the plaintiff to W. W. Robertson , to whose care did the said Robertson confide the plaintiff?

"Answer. Walter Melville Robertson.

"Q. 22. If you say that W. W. Robertson placed the plaintiff in the care of Walter Melville Robertson, was Walter Melville Robertson the son of W. W. Robertson?

"Answer. Yes.

"Q. 23. What instructions did W. W. Robertson give his son, Walter Melville Robertson when he placed the plaintiff, Samuel Calhoun, in his care?

"Answer. Keep him.

"Q. 24. Was W. W. Robertson an employee of the defendant?

"Answer. No.

"Q. 25. Was the said Walter Melville Robertson, to whom W. W. Robertson confided the care of plaintiff, Samuel Calhoun, after receiving him from his mother, an employee of the defendant?

"Answer. No.

"Q. 26. Was the plaintiff, Samuel Calhoun, injured while alighting from the train on which his mother took passage with him from Arkansas City, Kansas, to Edmond, Oklahoma?

"Answer. He was not.

"Q. 27. Did Anna Calhoun, plaintiff's mother, alight from the said train before the accident?

"Answer. No.

"Q. 28. Was the said train in motion leaving Edmond when the plaintiff, Samuel Calhoun, was taken off of the train by W. W .Robertson?

"Answer. Yes."

"Q. 29. At the time plaintiff, Samuel Calhoun, was taken off the train by W. W. Robertson, was the train moving too fast for plaintiff's mother safely to alight?

"Answer. Yes.

"Q. 30. Did the plaintiff's mother, Anna Calhoun, remain on the train after the plaintiff, Samuel Calhoun, was taken off by W. W. Robertson, because she thought the train was running too fast for her to alight with safety?

"Answer. Yes.

"Q. 31. Did the plaintiff's mother, Anna Calhoun, after Samuel Calhoun was taken off of the train by W. W. Robertson, and at a time when she knew that the train was running too fast for her to alight safely, request that plaintiff, Samuel Calhoun, be placed back on the train?

"Answer. No.

"Q. 32. To whom did Walter Melville Robertson give the custody of the plaintiff, Samuel Clahoun?

"Answer. To Carl Jones, thinking he was a railroad employee.

"Q. 33. If in answer to the last question you say that Walter Melville Robertson gave the custody of the plaintiff to Carl Jones, please say if the said Carl Jones was an employee of the defendant Railway Company?

"Answer. No.

"Q. 34. Did Carl Jones run alongside of the car to try and put the plaintiff, Samuel Calhoun, on the train?

"Answer. Yes.

"Q. 35. If you answer the last question yes, how fast was the train going at the time?

"Answer. Four to eight miles an hour.

"Q. 36. Was the train running at that time too fast for a passenger to alight from or board a train with safety?

"Answer. Yes.

"Q. 37. Did Carl Jones, in trying to place plaintiff, Samuel Calhoun, on the train run against a bag-

gage truck on the platform of the defendant at said station at Edmond?

"Answer. Yes.

"Q. 38. How far was it from the place where Carl Jones received the plaintiff, Samuel Calhoun from Walter Melville Robertson, to the place where he ran against the said truck?

"Answer. Seventy-five to one hundred feet.

"Q. 40. How far from the south end of the coach in which plaintiff and his mother were riding when the train stopped for the station of Edmond to the place where the said baggage truck was left on the platform?

"Answer. Seventy-five to one hundred feet."

Findings also show that none of the employes of the Company knew that Mrs. Calhoun was attempting to alight from the train at the time it started and that they did not know that Carl Jones was trying to put the plaintiff back on the train.

We are unable to see under the facts of this case by what process of reasoning the leaving of this truck on the platfrom where it had been used for a necessary purpose of loading and unloading baggage, and a hundred feet away from the place provided for entering and leaving the train can be held to be negligence.

By what process of reasoning can it be said that the railway company should have anticipated that any rational human being would act in such a negligent and reckless manner as the testimony shows was done by Carl Jones in this case.

In order for the plaintiff to recover, the accident from which he suffered the injury must be such as might reasonably be expected to flow from the negligent act of the defendant in leaving the truck in that position, if it was negligence, and should have been reasonably anticipated.

In order for the plaintiff to recover, the negligence of the railway company must have been the direct and proximate cause of the injury. A proximate cause in the law of negligence is such a cause as operates to produce particular consequences without the intervention of an independent, unforseen cause, without which the injury would not have occurred.

If A is guilty of a negligent act, which would not have produced the catastrophe but for the subsequent intervening negligence of B, such negligence of B not being the result which A might reasonably anticipate, nor one against which it was his duty to guard, A will not be responsible for the resulting damages.

If subsequent to the original wrongful or negligent act, a new cause has intervened of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote.

Thompson on Negligence, vol. 1, sec. 55.

In the case of Galveston, H. & S. A. Ry. Co. v. Chambers, 11 S. W. Rep., 279, the syllabus is as follows:

> "In an action against a railway company to recover for the death of a child caused by the alleged negligence of defendant, the evidence showed that the deceased was walking on the railroad track from school, when she stepped aside for a train until it had passed. The train had separated from some cause, and the rear car of the part attached to the locomotive was some fifty yards in advance of the foremost car in the part of the train following. After the first part of the train had passed, the child went upon the track and was run over by the cars following. It appears that as soon as the separation was seen, defendant's employees at once applied the brakes to stop the detached part of the train. *Held*, that the court erred in finding that the uncoupling of the train was the direct cause of the accident, and in holding defendant liable therefor."

In the opinion, at page 280, the court say.

> "If, then, it be conceded that the train separated from the failure of appellant or its servants to use proper care, can it be said, as the court found, 'that the uncoupling of the train was the direct cause of the death of the child.' "It cannot be said that the injury was the natural or probable result of the working of the train that ought to have been foreseen; and, but for the intervention of an independent cause brought into being by the exercise of a will in no way under the control of appellant or its servants, the accident never would have occurred."

In the case of Stone v. Boston & A. R. R. Co., 51 N. E. Rep., 1, the syllabus of the case is as follows:

> "1. Defendant's railway depot, freight house, and a platform used mostly for storing oil were situated across the street from plaintiff's buildings. The platform had become thoroughly saturated with oil leaking from the barrels. A teamster not connected with the defendant brought goods to be shipped by it, and, in lighting his pipe threw a match on the ground underneath the platform, which immediately caught fire, and with it the oil standing on the platform, destroying the plaintiff's buildings, as well as those of the defendant. All the oil had been on the platform for a longer time than forty-eight hours, which was prohibited by law. Plaintiff's buildings would probably not have been burned if there had been no oil on the platform. *Held*, that the fire resulting from leaving oil on the platform could not be apprehended by defendant, and, its acts not being the proximate cause of the fire plaintiff could not recover.
>
> "2. In an action for negligence, where the court is able to say that the injury is the remote, and not the proximate result of defendant's acts, it is proper to so direct the jury.
>
> "3. Where defendant was negligent in keeping oil upon a platform which was subsequently fired by the

carelessness of another, the acts of defendant and the third person are not concurrent."

In the opinion, at page 2, the court say:

"The rule is very often stated that in law, the proximate and not the remote cause is to be regarded, and, in applying this rule, it is sometimes said that the law will not look back from the injurious consequences beyond the last sufficient cause, and especially that, where an intelligent and responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him."

In the case of Glassey *vs.* Worcester Consolidated Street Ry. Co., 70 N. E. Rep., 199, the syllabus is as follows:

"Where a street railway company left a reel which had held feed wire lying on its side in the untraveled portion of a highway, and some boys rolled it down the street, striking plaintiff's carriage and injuring her, the negligence, if any, of the company, in leaving the reel in the highway was too remote to entitle plaintiff to recover."

In the opinion, at page 200, the court say:

"But assuming that the reel was left in the highway, and that that was some evidence of negligence, we think that such negligence was the remote and not the direct and proximate, cause of the plaintiff, Rachel's injury. * * * It seems to us that, conceding that there was evidence of negligence on the part of the defendant in leaving the reel where its servants did they could not be required to anticipate that this would happen in the ordinary course of events and therefore that the negligence was too remote."

In the case of Herr *et ux. vs.* City of Lebanon, 24 Atlantic, Rep., 207, the syllabus is as follows:

"Plaintiff was an omnibus passenger on a street of defendant city. The street was twenty feet wide, and in good condition. The horse drawing the omnibus fell about the middle of the street, and in its struggles to get up fell repeatedly, until it went over a declivity on the lower side of the street, taking the omnibus and plaintiff with it. There was no railing along the declivity. *Held,* the jury having found that the fall of the horse was not due to the negligence of the city, that plaintiff could not recover, such fall being the proximate cause of the injury."

In the opinion, at page 208, the court say:

"The learned judge stated the general rule to the jury correctly, but he seemed to be of opinion that the neglect of the city to erect a barrier and the failure and struggles of the horse, might be regarded as concurring causes of the accident, and the city might be required to pay for its results on that theory. This was a mistake. If two distinct causes are operating at the same time to produce a given result which might be *produced by either,* they are 'concurrent' causes, they run together, as the word signifies to the same end. But if two distinct causes are successive and unrelated in their operation, they cannot be concurring. One of them must then be the proximate, and the other the remote, cause. When they stand in this relation to each other and the result to be considered the law regards the proximate as the efficient and responsible cause and disregards the remote."

In the case of Schaeffer *vs.* Township of Jackson, 24 Atl., Rep., 629, the syllabus of the case is as follows:

"1. Where a hole in the road, and a pile of stones placed on a highway by the town supervisors, rendered the road at that place unsuitable and insufficient for ordinary public traffic, the township is guilty of negligence.

"2. Plaintiff had been driven safely past such place when the horse became frightened by a donkey, turned short round, breaking a wheel of the buggy, and ran back, one axle dragging on the ground. The dragging axle caused the buggy to be drawn to the side of the road where it caught in the hole. The buggy was upset and plaintiff injured. *Held*, that the township was not liable; the occurrence being extraordinary, and not the natural and probable result of the negligence, but of an independent, primary, efficient, proximate cause."

In the opinion, at page 630, the court say:

"But the cases must be rare in which an injury can be said to be the result of the negligence of a party when there is another and primary, efficient, proximate cause, wholly independent of such negligence and for which the party charged with negligence is in no way responsible. In such cases it would be incumbent on the plaintiff to show that the accident would have happened without the concurrence of the primary, efficient, proximate cause."

In the case of Texas & P. Ry. Co. *vs.* Beckworth, 32 S. W. Rep., 347, the syllabus is as follows:

"1. A railroad company, negligently failing to stop its train a reasonable length of time for its passengers to disembark and to provide reasonable facilities for that purpose, is not liable for injuries sustained by a boy four years old, who, after the train, had started, was put off by a passenger, where the act of such passenger was not the probable result of the defendant's negligence.

"2. In an action by a boy four years old against a railway company for personal injuries, it was error to charge that, if plaintiff's mother used ordinary care in getting off defendant's train and was injured, and the injuries were caused by the negligence of defendant, plaintiff was entitled to recover as it authorized

the jury to find for plaintiff if plaintiff's mother was injured."

In the opinion, at page 348, the court say:

"The first error assigned is, in effect, that the court erred in refusing to give to the jury the defendant's special requested charge number 1: * * * 'The jury is instructed that in this case, though you may find that the defendant was negligent in failing to stop its train at the proper place, and in helping the plaintiff off the train, yet if you find from the evidence that the plaintiff sustained no injuries by reason of that negligence, if any, but did receive injuries by being helped or dropped from the car by a passenger in said train, not connected in any manner with the railroad company, after the train had started to move, and under circumstances that rendered putting said plaintiff off the train dangerous, then defendant would not be liable for such injuries and you should find accordingly."

* * * * * * * * * *

"While the point is not fully and carefully guarded by the special instructions asked, yet it was sufficient to call the attention of the court to the point, and the jury should have been instructed to the effect that, even if appellant was negligent in failing to stop its train a reasonable length of time for its passengers to disembark and in failing to provide reasonable and proper facilities for that purpose, yet, if plaintiff sustained no injury by reason of that negligence, but did receive injuries by being helped or dropped from the car by a passenger on the train, after it had started to move, and the act of such passenger in putting plaintiff off the moving train was not such an act as might reasonably have been anticipated under ordinary circumstances from appellant's negligent act, as a natural and probable result thereof, then the act of such third person was an independent cause of the injury, and defendant would not be liable

therefor. In other words, if there was an intervening cause between the negligence of the defendant and the injury sustained, so that such intervening agent became itself the proximate cause of the injury, and was not such as could have been reasonably contemplated from the act of the defendant, then there can be no recovery."

In the case of Cleghorn *vs.* Thompson, 64 Pac. Rep. 605, the syllabus of the case is as follows:

"Negligence, to be actionable, must result in damage to some one, which result in the absence of wantoness or *malo animo*, might have been reasonably foreseen by a man of ordinary intelligence and pruence, and be the probable result of the initial act.

"2. The allegation of negligence is not sustained by evidence of acts resulting in damage to another, which result is not the reasonable and ordinary outcome of such acts, and which would not have been foreseen or anticipated by the exercise of ordinary prudence and foresight under all the circumstances of the case."

In the case of Mo. Pac. Ry. Co. *vs.* Columbia, 69 Pac. Rep. 338, the syllabus of the case is as follows:

"1. In a case where two distinct, successive causes, wholly unrelated in operation, contribute toward the production of an accident resulting in injury and damage, one of such causes must be the proximate and the other the remote cause of the injury.

"2. A prior and remote cause cannot be made the basis of an action for the recovery of damages if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury.

"3. In a case where it is either admitted, or from the facts as found established, that two distinct, successive causes, unrelated in their operation, conjoined to produce a given injury, the question of remote and proximate cause becomes one of law for the decision of the court, and not of fact for the determination of the jury, and the determination of this question of law by the jury is not binding or conclusive upon the court."

In the opinion at page 341, the court say:

"In cases of this character where two distinct, successive causes, unrelated in operation, to some extent contribute to an injury, it is settled where there is an intervening and direct cause, a prior and remote cause cannot be made the basis for recovery of damages, if such prior cause did no more than furnish the condition or give rise to the occasion by which the injury was made possible. And it seems to be sound in principle and well settled by authority, where it is admitted or found that two distinct, successive causes, unrelated in their operation, conjoin to produce a given injury, one of them must be the proximate and the other the remote cause of the injury, and the court in finding upon the facts as found or admitted to exist, must regard the proximate as the efficient and consequent cause and disregard the remote cause."

In the case of Frassi *vs.* McDonald, 55 Pac. Rep. 139., the fourth point of the syllabus is as follows:

"After a lot-owner had caused an excavation to be made under an adequate sidewalk without consent of the city, an independent contractor made an opening in the sidewalk through which plaintiff fell to his injury. *Held,* that the owner was not liable as the excavation was not the direct cause of the injury."

In Stanton *vs.* Louisville and Nashville R. Co., 8 So., Rep. 798, the first point of the syllabus is as follows:

"1. The obstruction of a public crossing by a railroad train, thereby preventing plaintiff from driving across for more than half an hour, does not render the company liable for injuries to the plaintiff caused by the fact that at the expiration of that time his horse became frightened and ran away at the approach of a second engine and train, as the fright of the horse is only the remote consequence of the obstruction of the crossing."

In the case of Lewis *vs.* Flint & P. M. Ry. Co., 19 N. W. Rep., 744, the first paragraph of the syllabus is as follows:

"Plaintiff, in the night time took passage on the caboose attached to a freight train on defendant's road, to be carried to a flag station where he expected to get off and walk by the highway for some distance into the country. The night was dark and the station-house was not kept open in the night, and was not lighted. The train passed the station a little before stopping. When plaintiff got off he could not see the station-house and the conductor told him he was about two car lengths beyond it. The plaintiff said if that was all it made no difference, as he had to go that way to the highway. He started along the track towards the highway, as he supposed, and, if he was where he supposed he was, he would have to cross a cattle guard to reach it. He had crossed this cattle guard before and sometimes found a timber or plank over it. He soon discovered, however, that he had been left beyond the highway, and he turned about to go back to it. To reach it he would be obliged to cross the cattle guard on that side. He knew this and was proceeding cautiously, intending when he reached the cattle guard to step down into it, and out on the other side, unless he should find timber or plank laid across it. Coming to the brink of it he saw indistinctly what he took to be the cattle guard some paces off, and, stepping forward, his foot slipped and he fell into it and was seriously injured. For this injury he brought suit, counting up-

on the negligence of defendant in carrying him past the station, and in misinforming him as to where he was. *Held*, that the negligence of defendant was not the proximate cause of the injury, it was only the cause of plaintiff being placed where, through another concurrence happening unexpectedly and without fault, an injury befell him."

In the opinion, at page 745, the court say:

"In this case the court took the case from the jury and directed a verdict for the defendant. This direction is understood to have been given on the ground that the injury which the plaintiff suffered was not proximate to the wrong attributable to the defendant, and for that reason would not support an action. The wrong of defendant consisted in carrying the plaintiff past the station, and then giving him erroneous information as to where he was. If the injury suffered was not the proximate consequence of this wrong, the instruction of the court was right; otherwise, not. The difficulty here is in determining what is and what is not the proximate consequence in contemplation of law."

* * * * * * * * * *

Again, in the opinion, at page 749, the court say :

"Upon the undisputed facts of the case the plaintiff has no right of action for the injury which has befallen him and the circuit court was correct in so holding."

In the case of Claypool *vs.* Wigmore, 71 N. E. Rep. 509, the first and second points of the syllabus are as follows:

"1. A proximate cause is the cause which, in a natural and continuous sequence, unbroken by any independent intervening agency, produces the result complained of.

"2. Plaintiff was injured by falling down an elevator shaft in a public building. Had she looked carecarefully before stepping into the shaft, she could have

seen that the cage was not there. She had ridden on the elevator before the accident, and knew that the cage was operated by a man standing inside, and had observed that no one but the operator opened the door and let passengers in and out. The door to the shaft was partially open when plaintiff reached it and her companion, not an employee of the owner of the building, opened the door so she could enter and she walked into the shaft without heeding whether the cage was there or not. *Held*, that, even if the owner should be held chargeable with negligence because he allowed the door to the shaft to be left partially open, he was not liable for the injuries sustained, as the negligent act of plaintiff's companion was the act of an independent intervening agent, and was the proximate cause of the injury."

In the opinion, at page 510, the court say:

"We must determine the rights of the respective parties upon the facts specially found, and keep in mind the fact that the building in which appellee was injured was a public place, where she was invited and had a right to be. From the view of the law which we have taken, as applied to the facts found, we do not deem it necessary to discuss or decide the question of appellant's negligence, as a principle of law is involved which absolves him from liability. While the facts in the first instance do not show that appellant's agent or servant left the door of the elevator shaft open a width of eight inches, yet, if it may be conceded that he did, that fact was not the proximate cause of the injury, for it is affirmatively found that, if the door had been left in the condition it was when appellee reached it, she would not have been injured. The direct and proximate cause of her injury was the opening of the door by Wallsmith, with which act appellant was in no wise connected and for which he was not responsible. A proximate cause is well defined in the following language: 'A proximate cause may be defined as that cause which, in natural

and continuous sequence, unbroken by any efficient, intervening cause, produces the result complained of, and without which that result would not have occurred.' "

In the case of Baltimore, etc., Ry. Co. *vs.* Trainor, 33 Md., 542, the supreme court of Maryland, defining "remote," and "proximate" cause, said:

> "By 'proximate' cause is intended an act which directly produced, or concurred directly in producing, the injury. By 'remote' cause is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened."

In the case of Hoag & Alger *vs.* L. S. & M. S. R. Co., 85 Pa. St. 293, the first and second points of the syllabus are as follows:

> "1. Where it is alleged that an injury arose from negligence the question of proximate cause is to be decided by the jury upon all the facts of the case, but where the facts are undisputed and the intervening agency is manifect, it is not error for the court to withhold the evidence from the jury.
>
> "2. In determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

The facts of the case are as follows:

> "Plaintiff owned an oil lease in Oil City, near the track of defendant. The railroad of defendant runs along the right bank of Oil Creek, at the base of a high and precipitous hill. On the fifth of April, 1873, during a rain storm, a slide of earth and rocks came down the side of the hill and lodged on defendant's track. A short time after this slide fell, a train, consisting of

seventeen cars of crude petroleum, ran into the slide. The train was thrown from the track and the oil cars bursting, the petroleum was ignited by the fire from the engine. The oil thus ignited, ran into the creek, and was carried down the stream some three or four hundred feet, and set fire to the buildings of the plaintiff, which were totally destroyed."

It appears further from the case that the allegation of negligence was failure on the part of the engineer to stop the train and avoid running into the obstruction.

In the opinion at page 298, the court say:

"The probable consequence of the collision, such as the engineer would have a right to expect, would be the throwing of the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil tanks; the oil taking fire, the burning oil running into and being carried down the stream; and the sudden rising of the waters of the stream, by means of which, in part at least, the burning oil set fire to the plaintiff's buildings?"

* * * * * * * * *

"It is manifest that the negligence was the remote and not the proximate cause of the injury to plaintiff's buildings."

In the case of Cuff, Admix. *vs.* N. & N. Y. R. Co., 35 N. J. L., 18, the third and fourth points of the syllabus are as follows:

"3. Damage to be recovered must be both the natural and proximate consequence arising from the wrong complained of, and not from the wrongful act of a third party remotely induced thereby.

"4. The intervention of the independent act of a third person between the wrong complained of and the injury sustained, which act was the immediate cause of the injury, is made a test of that remoteness of damage which forbids its recovery."

In the opinion, at page 19, the court say:

"The injuries which the deceased sustained were received upon that part of the track which was known as section 4. The graduation and masonry upon that section were contracted for by the company with the other defendants, who were partners, under the name of Flanagan and Sage. Flanagan and Sage, had, with the consent of the company, sub-contracted the rock excavation to one T. P. Shaffner, and it was understood by all parties, before the contract was made with Shaffner, that the rock was to be removed by blasting with the use of nitro-glycerine. The negligence from which the death of the deceased resulted, was that of one Burns, in the use of nitro-glycerine on the premises owned by the company. Burns was an employee of Shaffner, the sub-contractor, selected by him for the particular duty of taking charge of the nitro-glycerine used on the works.

"After the sub-letting to Shaffner, he applied to the engineer of the company for permission to occupy a portion of their land upon which he might erect a magazine in which to store the oil necessary for executing the work of blasting. The permission was granted and the magazine was located by the directions of the company's engineer."

* * * * * * * * * *

"It will be assumed on the present occasion, in order to reach at once the merits of the controversy, that the magazine as located, when used for the storage of nitro-glycerine, was a public nuisance; and that the engineer of the company was their agent in consenting to the use of their lands, and that Burns was an improper person, by reason of habits of intoxication to be entrusted with the handling of the highly dangerous article of which he had the charge; and that he was intoxicated at the time of the accident.

"This concession obviates the necessity of examining the evidence bearing upon disputed questions of fact, and resolves the inquiry into a consideration

of pure questions of law upon facts not in dispute. The liability of the company to respond for the injuries received by the deceased, was sought to be placed on two grounds: First, that Burns, under the circumstanes of this case, was the servant of the company; and Second, that the injury resulted from a nuisance, erected and maintained on their lands by their consent."

It was sought to charge the railway company because the magazine which exploded and caused the death was a nuisance, notwithstanding the fact that the explosion was caused by the negligence of Burns. In the opinion, at page 32, the court say:

> "In other cases the intervention of the independent act of a third person between the wrong complained of and the injury sustained, which was the immediate cause of the injury is made a test of that remoteness of damage which forbids its recovery. * * * Tested by the principle above stated, it is obvious that the injury received by the deceased, from which death resulted, is too far removed from the act of the company to impose a liability for it upon them. It did not result naturally or proximately from the nuisance they permitted on their lands, but was caused directly by the unauthorized and independent act of a third person intervening between the nuisance they consented to and the injury."

See also—

Hofnagle *vs.* N. Y. C. & H. R. R. Co., 55 N. Y., 608.

In the case of N. T. C. & St. I. R. Co. *vs.* Perigeuy, 138 Ind., 414, the syllabus of the case is as follows:

> "A, as an engineer, was in charge of engine No. 172, which he was required to operate with a defective headlight. A had special orders to stop at S, and remain until No. 167 passed. A stopped at S, but in violation of such order, pursued his journey with the defective engine, before No. 167 had passed. Af-

ter leaving .8 2 3-4 miles, and having obseryed the approach of No. 167. A stopped his engine when one and one-fourth miles distant from No. 167, there being upon the front of No. 172, two green lights burning brightly and on board were hand lamps to be lighted and placed in the headlight when it failed, for any reason, which, when placed in the headlight, could be seen for a distance of five miles, but on this occasion they were not so placed, and no headlight was burning. From S eastward, the track was straight and free from obstruction, with a decline in the grade for four miles. No. 167 came from the east at the rate of thirty miles an hour, and her engineer and fireman having looked but failed to observe No. 172, collided with the same, in which collision B, the fireman on No. 172, was injured, for which injury he sues the railroad company for damages.

"*Held,* that the proximate cause of B's injury was the negligence of A, a fellow servant of B, in not obeying the order given him to remain on the side track at S until No. 167 passed, and in failing to place the lighted hand lamps in the headlight.

"*Held, also,* that the negligence of the railroad company in failing to furnish a proper headlight was a remote cause of the injury.

"*Held, also,* that the negligent omission of the company to furnish a proper headlight, and the negligent acts of A were not concurrent in causing the injury."

This case cites many authorities.

In Negligence of Imposed Duties, Passenger Carriers, Mr. Ray, at page 669, says:

"But where the concurring cause is the independent, wrongful act of a responsible person, such act arrests causation, being regarded as the proximate of the injury, the original negligence being considered as its remote cause. As, in the law it is the proximate and not the remote cause which is regarded, he who is guilty of the original negligence is not

chargeable, but redress must be sought from him who directly caused the injury.

"It may be stated as the true and guiding rule, that unless the injury or damage are known to be usually in consequence of the wrong—according to the ordinary course of events, following from the particular wrong they will not support an action. But the negligence of a responsible agent intervening between the defendant's negligence and the injury suffered, *i. e.* the damage breaks the causal connection.

"In civil cases a defendant is not responsible for results, except such as are natural, proximate and direct, if such consequences are caused by the acts of others, so operating on his act as to produce the injurious consequences then he is not liable."

In the case of Alexander *vs.* The Town of Newcastle, 115 Ind., 51, the first paragraph of the syllabus is as follows:

"Where one, while passing along the street of a town in charge of a prisoner, is seized by the latter, in an attempt to escape, and thrown into a pit negligently permitted by the town authorities to remain in the street, whereby he suffers injury, the town is not liable, its negligence not being the proximate cause of of the injury."

In the opinion, at page 53, the court say:

"However negligent a person, or a corporation, may have been in some particular respect, he, or it, is only liable to those who may have been injured by reason of such negligence, and the negligence must have been the proximate cause of the injury sued for. where some independent agency has intervened and been the immediate cause of the injury, the party guilty of negligence in the first instance is not responsible. On that subject, Wharton, in his work on the Law of Negligence, at section 134, says: 'Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the de-

fendant liable to the plaintiff?' This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action."

In the case of McGahan *vs.* Indianapolis Natural Gas Co. 37 N. E. Rep., 601, the syllabus of the case is as follows:

"A complaint alleging negligence in defendant gas company's failure to turn off the gas for a tenant, after being directed so to do, that a defect in the pipe within the cellar might be located and remedied, and that plaintiff, a plumber, while searching for the defect, was injured by an explosion, does not show that the injury was the proximate result of defendant's negligence, as it will be presumed that there was an intervening responsible agency, for which defendant was not responsible."

In the case of Williams *vs.* Woodward Iron Co., 17 So. Rep. 517, the second point of the syllabus is as follows:

"Defendant required its employees to leave a switch open at the lower end of a side track while any cars were on the side track, so that escaping cars would be derailed at that point, and not get on the main line. On the occasion complained of the switch was open under this rule until after a car escaped from defendant's employees and started down the side track when a stranger, standing near, became greatly excited, and closed the switch. and caused a car to pass on to the main track, whereby plaintiff's intestate, a brakeman on a train on the main track, was killed. *Held*, that the death of the deceased did not result proximately from any negligence of defendant, and defendant was not liable."

In the case of Lowery *vs.* The Western Union Telegraph Co., 60 N. Y., 198, the syllabus of the case is as follows:

"One B sent a telegram by defendant's line to plaintiff, asking for $500.00. By the negligence of defendant's employees the message was changed to $5000.00, which sum plaintiff sent to B, who, upon receipt, appropriated it to his own use and absconded. In an action to recover damages the referee allowed the amount of the loss. *Held,* error; that defendant's negligence was not the proximate cause of the loss, as the embezzlement of B did not naturally result therefrom, and could not reasonably have been expected."

In the case of Mars *vs.* President, etc of Delaware & H. Canal Co., 8 N. Y. Supp. 107, the syllabus of the case is as follows:

"1. In an action for injuries received by plaintiff while a passenger on defendant's railroad train, by its collision with a 'wildcat' engine, it appeared that the engine had been left on a side track, two tracks away from the main track, on which the collision occurred, with its fire banked, and in charge of an employee, M, and while he was absent from it, after it had been standing six hours, it was moved across the intervening track, past several switches, to the main track, and there was evidence that it was moved southward to the main track, and then sent northward. There was no evidence as to who set it in motion, but it was conceded that M did not. *Held,* that defendant was entitled to have the jury instructed that, if the engine was maliciously started by one of its employees other than M, it was not liable, and that it was error to charge that defendant was liable if the act was done by an employee, though negligently or wilfully, as such act would be outside of an employee's authority.

"2. Even if defendant were guilty of negligence in leaving the engine on a side track unattended, and with fire in it, that negligence was not the proximate cause of plaintiff's injury, if the engine were moved to the main track by a wrongdoer."

In Beall *vs.* Township of Athens, 81 Mich., 536, the syllabus of the case is as follows:

> "1. A township is only liable, under act No. 264, Laws of 1887, for injuries sustained by reason of its neglect to keep its highways in repair, where such neglect is the proximate cause of the injury. So held, where the person injured was driving along a portion of the highway which had been raised above the level of the ground by an embankment from nine to fourteen feet wide on the top, along which no barriers had been erected. The horse became frightened at a log lying outside of the wrought portion of the highway, and, on being struck by the driver, sprang forward, and upset the buggy, causing the injury complained of. And it is held that the primary cause of the accident arose from the horse taking fright at the log, and the act of the driver in strking him with his whip.
>
> "2. The court correctly charged the jury that the presence of the log in the highway in the place stated was not such defect as would render the township liable; citing Agnew *v.* Corunna, (55 Mich., 428).
>
> "3. An injury caused by negligence, and an accident not being prevented by negligence, are very distinct in operation and effect. The first is covered by the statute cited, and the other is not."

In the case of Washington *vs.* B. & O. R. R. Co. 17 West. Va. 190, the third point of the syllabus is as follows:

> "The cause of an injury in the contemplation of law is that which *immediately* produces it as its natural consequence; and therefore if a party be guilty of an act of negligence, which would naturally produce an injury to another, but, before such injury actually results, a third person does some act, which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is in no degree responsible therefor, though the injury could never have occurred but for his negligence.

The causal connection between the first act of negligence and the injury is broken by the intervention of the act of a responsible party, which act is in law regarded as the sole cause of the injury according to the maxim, *'In jure non remota causa sed proxima spectatur.'*."

In the case of Chicago, St. P., M. & O. Ry. *vs.* Elliott, 55 Fed. Rep. 949, the syllabus states the law as follows:

"1. An injury that is the natural and probable consequence of an act of negligence is actionable.

"2. An injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable.

"3. An injury that is not the natural consequence of an act of negligence, and that would not have resulted from it but for the interposition of a new and independent cause, is not actionable. * *

* * * * * * * * * * *

"5. If the plaintiff fails to show that the negligence with which he charges the defendant was the proximate case of the injury he cannot recover.

"6. Plaintiff was in charge of certain stock shipped by rail, and was riding in the caboose. Before reaching a certain station, where he knew it was usual to change cabooses, he asked the conductor if a change would be made there, and was answered in the negative, and told that the train would only stop a few moments and he would have no time to examine his stock. On reaching the station, however, he got off, walked forward, and examined several cars of the stock, and then turned back, but, the train having already started, he feared he would be unable to board the caboose and therefore climbed upon a stock car, and walked backward along the top of the train. Before he reached the caboose the train had stopped and was backing for the purpose of changing the caboose, and it was *kicked* off from the train just as he was

stepping upon it, causing him to fall to the track, where his foot was crushed by a wheel. *Held*, that the statement of the conductor that the caboose would not be changed was not the proximate cause of the injury, and it was error to allow evidence thereof to go to the jury."

In the opinion, at page 952, the court say:

"The question in this case, then, is, was it the natural and probable consequence of the statement made by the conductor, that he would not change cabooses, and would not stop more than five minutes, at Spooner,—was it reasonably to be anticipated from this statement that the plaintiff, after the train had stopped at that station ten minutes, would climb upon the top of the cars, and be in the act of stepping from the rear stock car to the caboose at the very instant that the latter was kicked off the train?

"A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. Was there one chance in a hundred that this drover, in reliance on such a statement, would climb upon this train, and so time his movement as to step off the rear stock car at the very instant the caboose parted from it? We think not. If he had alighted from the caboose, or climbed the car, or made any of his movements, after the train stopped at Spooner, thirty seconds earlier or later than he did, he would not have been injured. * * * No one, in our opinion, could have anticipated such an effect from so remote a cause. It was far from such a result as might or ought to have been foreseen by the conductor as likely to follow from his act, and it was error, in our opinion, to submit the evidence relating to these conversations to the consideration of the jury."

In the case of Pike *vs.* Grand Trunk Ry. Co. 39 Fed. Rep. 255, the syllabus of the case is as follows:

"Plaintiff's intestate left the house where she lived, and went forty or fifty rods, to where there was a fire set by defendant's locomotive. In attempting to extinguish the fire she was fatally burned. The house where she lived was not then in danger, nor did she have any interest in the property which was on fire. *Held*, that the proximate cause of her injury was her own voluntary act and there could be no recovery.

"2. Where the facts are undisputed it is the province of the court to determine the question of proximate cause."

In the case of Cartarsso, guardian, *vs.* The Burgundia, 29 Fed. Rep., 464, the syllabus of the case is as follows:

"Libellant's ward, an infant three years old was injured on board of the steamship Burgundia, by the rudder chain, which ran in an open box on the main deck. Previous to the accident, the infant's nurse had left him to himself, and, when hurt, he was in a part of the ship where he had no right to be. *Held*, that the fault rested with those who had charge of the child, and that the vessel was not liable for the injury."

In Scheffer vs. Railroad Co., 105 U. S. Rep., 249, the syllabus of the case is as follows:

"By reason of a collision of railway trains in Virginia a passenger was injured, and becoming thereby disordered in mind and body, he some eight months afterward committed suicide. *Held*, in a suit by his personal representatives against the railway company, that as his own act was the proximate cause of his death, they were not entitled to recover."

In the opinion, at page 252, the court quotes from the opinion in Milwaukee & St. Paul Ry. Co. *vs.* Kellogg, 94 U. S., 469, as follows:

"But it is generally held, that in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Continuing and commenting upon the case in hand, the court say:

"Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule of both these cases a new cause, and a sufficient cause of death.

"The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible facts or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends.

"The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train."

In the case of Cole vs. German Savings and Loan Society, 124 Fed. Rep., 113, the syllabus of the case is as follows:

"1. An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury.

"2. But an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable, and such

an act is either the remote cause, or no cause whatever, of the injury.

"3. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that probably would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable, and such an act of negligence is the remote cause, and the independent intervening cause is the proximate cause, of the injury.

"4. It is no defense to an action for damages for an injury of which the act or omission of the defendant was the proximate cause that the negligent or wrongful act of another concurred with the recklessness of the defendant to produce untoward result.

"5. But the concurring negligence of another cannot transform the remote into the proximate cause of an injury, or create or increase the liability of the defendant. It cannot make an injury which was not the natural and probable result of the negligent acts or omissions of the defendant their natural and probable consequence. No act contributes to an injury, in the legal acceptation of that term, unless it is a proximate cause of that injury, and no one is liable for an injury unless it was the natural and probable result of his act.

"6. The plaintiff entered and passed along a hall in the building of the defendant to take the elevator, the well or shaft of which opened into the hall. A boy, who was a stranger to her and to the defendant, hurried past her in the hall, pushed the sliding door of the well of the elevator, which was open from one to ten inches, back as far as it would go and stepped back. The plaintiff supposed this boy was the operator of the elevator, and stepped in. The elevator was at an upper floor in charge of its regular operator, and plaintiff fell to the bottom of the well

and was injured. The hall was so dark that it was difficult, but not impossible, to see the elevator when it was at the lower floor, and when it was not there nothing but darkness was visible in the well. The strange boy had been seen by witnesses riding and visiting on the elevator a dozen times and endeavoring to operate it once. The door of the shaft or well could be opened from the outside, when it was latched by lifting and sliding it. It would bound open from one to ten inches when the operator jammed it, and it was often left open to that extent *Held*, that the negligent acts and omissions of the defendant were not, and those of the strange boy were, the proximate cause of the injury. The latter constituted an independent intervening cause, which interrupted the natural sequence of events between the negligence of the defendant and the injury of the plaintiff, insulated the defendant's negligence from the plaintiff's hurt, broke the causal connection between them, and produced her injury.

"7. The act of the strange boy could not be foreseen or reasonably anticipated as the probable result of the negligent acts or omissions of the defendant. The violation of law or duty by a third party, when not intended by a defendant, is not regarded by the law as the natural consequences of his acts of negligence and cannot be reasonably anticipated as their probable result.

"8. There is always a preliminary question for the judge at the close of the evidence in every trial to a jury that is, not whether or not there is any evidence, but whether or not there is any substantial evidence upon which a jury can properly render a verdict for the party who relies upon it.

"9. The question, what is the proximate cause of an injury, is ordinarily a question for the jury. But the burden is always on the plaintiff in an action for personal injury, to show that the negligence charged was the proximate cause of the injury; and

where, at the close of the trial, there is no substantial evidence upon which the jury can properly find that the defendant's negligence was the proximate cause of the injury, it is the duty of the court, as it is in a like condition of the evidence in the trial of other issues of fact to peremptorily instruct the jury to return a verdict for the defendant."

In the opinion, at page 117, the court say:

"But, unless the ultimate is the natural and probable consequence of the defendant's act of negligence, that act is not the proximate cause of the injury, and no action can be maintained upon it, whether the succeeding injury results from that act alone or from that act and the concurring and succeeding negligence of the stranger. In other words, the concurring negligence of another cannot transform an act of negligence which is so remote a cause of an injury that is not actionable, into a cause so proximate that an action can be maintained upon it. It cannot create a liability against one who does not legally cause it or make an injury the natural and probable result of a prior act of negligence which was not, or would not have been, such a result in its absence. No act contributes to an injury, in the legal acceptation of that term, unless it is a proximate cause of that injury,—unless that injury could and ought to have been foreseen or reasonably anticipated as its probable consequence. The conclusion eventually follows that the concurring negligence of the trespasser in this case does not answer the primary question which the action presents.

"It leaves it entirely undetermined, and that question still recurs. Was the injury of the plaintiff the natural and probable result of the acts or omissions of the defendant? let us see.

"That negligence consisted of permitting such a degree of darkness in the hall opposite the door which opened into the well of the elevator that it was difficult to see whether or not the elevator was there:

of allowing boys to visit in, ride upon, and sometimes to operate the elevator; of allowing the boy who opened the door to the well, to ride and visit in the elevator about a dozen times, and to endeavor to operate it at least once; of neglecting to provide a lock for the door which would prevent any one from opening it from the outside; and of permitting the door to stand open from one to ten inches. The burden of proof was upon the plaintiff to establish a state of facts which would naturally lead to the conclusion that her entrance and fall in the well were the natural and probable consequences of these acts of negligence committed by the defendant. If she failed to successfully bear this burden, she was entitled to no damages from the Savings and Loan Society.

"Chicago, St. P., M. & O. Ry. Co. *vs.* Elliott, 55 Fed. Rep. 949.

"U. P. Ry. Co. vs. Callaghan, 56 Fed. Rep., 988 and 993.

"Where is the evidence to sustain such a conclusion? The best evidence upon such an issue is the testimony of experience, because what has been is our best guide as to what will be. * * * but counsel seek to escape from the natural effect of this evidence by the contention that the voluntary act of the strange boy in opening the door of the well when the elevator was at the upper floor could and should have been foreseen and anticipated as the probable result of the unlocked door, and the visits of the boy upon the elevator, and of his previous attempt to operate it. This argument loses sight of the fact that the wrongful act of this trespasser was not committed in operating, or in attempting to operate, the elevator, in riding or visiting upon it, or in the doing of any act which he had ever done before. He had never opened the door into the empty well and invited a patron of the elevator to step into it before this accident occurred. How could any one reasonably anticipate that he would be guilty of such an act? The facts that he had visited upon the elevator and had attempted to

operate it with the permission of the employee in charge of it gave no warning of any such purpose on his part or of the probability of any such act. Mr. Justice Holmes, in delivering the opinion of the supreme court of Massachusetts, in Burt *v.* Advertiser Newspaper Co., 154 Mass., 238, 247, said: 'Wrongful acts of independent third persons not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual.'

"The act of the strange boy was a violation of the law; it was a trespass upon the property and upon the rights of the defendant. The defendant could not foresee or reasonably anticipate, and it was not required to anticipate or to provide for, violations of the law and trespasses upon its property by its fellow-citizens. The legal presumption was that this boy and all boys and men would obey the law, would refrain from committing trespasses upon the defendant's right or property and would discharge their moral and social duties. The defendant had the right to indulge in this presumption, and to calculate the natural and probable result of its acts and omissions upon this supposition. Indeed, it could reckon with no other; for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellows will either violate the laws or disregard their duties. "Little Rock & M. R. Co. *vs.* Barry, 84 Fed. Rep. 944, 950.

"The mischievous act of the strange boy which caused the plaintiff's hurt could not have been foreseen nor reasonably anticipated as the probable result of the defendant's act of negligence, because it was a violation of law and of duty, and because there was nothing in previous experience, observation, or information to lead to such an anticipation."

the case of The Atchison, Topeka and Santa Fe Railway Company *vs.* Dickens, 103 S. W. Rep. page 750. In the opinion at page 754, *et sequens*, the court say:

> "Was there sufficient evidence of the company's negligence in the act which was the proximate cause to justify the submission of the case to the jury? We have pointed out that there was no proof of any negligent act of defendant, unless it were that the engine was allowed to stand on the track at the coal chute, with full head of steam, and unguarded. Was this an act so negligent and existing under such circumstances as that it could be attached to the intervening act of Cooper, so as to make the defendant liable for the injury to the deceased? It was at 10 o'clock at night. The engine had been placed at the coal chute for the purpose of being supplied with coal, and when supplied must be moved away. Hence, the necessity for steam. It was in the company's yards, and on its tracks, and at a proper place. The engineer who left it there was a competent man. The engine was in good condition. The steam had been shut off, and the lever operating the steam valve was so adjusted that no steam could escape into the cylinders or other part of the machinery to cause it to move. The only evidence as to whether or not it was safe to allow an engine to so stand was by the railroad employees, who testified that it was. As it stood, unmolested, it was harmless. It was shown by the proof that the company did not permit men who worked at the chute to handle the engines, and that this was known to the employees at the chute. The engine was handled by the hostler, the man who had control of the yard, and his assistants, all shown to be competent men, or at least not shown to have been incompetent. The only danger that could possibly arise from leaving the engine unguarded under such conditions would be that some one unaccustomed to handling engines might possibly get upon it, and, in railroad language, 'run it wild;' and this is the only act of negligence, if it

were negligence, that was at all proven against the defendant. When it is considered that the occurrence was in the night, and within the yards, a time and place when and where no persons were shown to have been, or reasonably could have been expected to be, except the employees of the defendant working in the yards handling the engines, and those of Closson working at the chute supplying the coal, those in the yard competent men, and those at the chute forbidden to handle the engines, and the engine itself in good condition, with steam shut off, we do not think, under the circumstances, that negligence is shown on the part of the defendant. But, conceding that this was negligence, then, was it the proximate cause of the injury, and the natural and probable result of the act of the engineer that could have been reasonably foreseen and contemplated by him? The court's charge on this point is as follows: 'But in injury that could not have been foreseen or reasonably anticipated as a probable consequence, and that probably would not have resulted from it had not the interposition of some new and independent cause interrupted the natural sequence of events and turned aside their course and produced it, is not actionable.'

"There is no question but that the act of Cooper was negligence in a high degree, and, if the company were also negligent, his act was the intervening cause of the injury. But he being an employee of an independent contractor, before the company can be held liable, it must not only appear that it was guilty of an act of negligence, but that act must have been so connected with the injury and the intervening act of Cooper as to constitute a proximate cause of the injury, and it must have been an act which, when done, would naturally and probably result in the injury, and this result must have been so apparent at the time that the engineer could reasonably foresee it. It must be established that there was a causal connection between the act of negligence of the company and the injury, and that this causal connection had not been broken by the interposition of some independent force

that took advantage of the situation to accomplish something not the probable or natural effect of the situation as it existed. In the case of Ins. Co. *v.* Boon, 95 U. S. 117, the Supreme Court of the United States say: 'The proximate cause is the efficient cause—the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones.' In Railway Co. *v.* Kellogg, 94 U. S. 469, the same court say: 'The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? In the case of Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 405, decided by the Circuit Court of Appeals for the Seventh Circuit, the court, in laying down the rule and quoting from both the above cases, say: 'The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof.' The absence of the valve was, doubtless, in a sense, a cause of the injury—an antecedent cause. But, where the negligent act is not wanton or *malum in se*, the law stops at the immediate, and does not reach back to the antecedent, cause. The causal connection between the negligence and the hurt is interrupted by the interposition of an independent human agency and, as Mr. Wharton expresses the thought, the intervener acts as a non-conductor and insulates the negligence.' The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury and superceding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an occasion or condition? Here the gas company gave the negligent act a mischievous direction.

If but for such interposition the defendant's negligence would have produced no injury, the causal connection is broken, because the intervening act made the act of negligence, otherwise innocuous, operative to injury. The injury must be the natural and probable consequence of the negligent act, and such as ought to have been foreseen in the light of attending circumstances. * * * The negligent omission of the valve did not necessarily set the other causes in operation. It was, in the language of the Boon Case, above referred to, the incidental cause, or the instrument of a superior and controlling agency, and was therefore not the proximate and responsible one. If the owner of a magazine in which gunpowder is stored should carelessly leave open its door, and a responsible human being should enter with a lighted candle, knowing of the presence of the gunpowder, and an explosion should ensue, could it be affirmed that in any legal sense the careless act of leaving open the door was the cause of the explosion?"

"Applying this rule to the facts of this case, and conceding for this purpose that the act of leaving the engine unguarded was a negligent one, was it the proximate cause of the injury? Was the act of Cooper the 'natural and probable' consequence of the act of the engineer, and so palpable to him that he would have reasonable grounds to believe it would occur?' Or, would the injury have occurred if the causal connection between the wrong of the company and the injury had not been broken by the intervening negligent act of Cooper? As the engine stood, to be supplied with fuel, the steam shut off, and in good condition, it was harmless; and before it could possibly become an instrument of danger some independent, intervening cause must have thrown the lever and put on the steam. There were no children nor young and inexperienced persons around to be lured to the standing engine, and this case must not be confounded with that class of cases. If it became necessary to move the engine, the proof shows that ex-

perienced hostlers, whose duty was to handle engines in the yards, were within easy call. The company had provided them for that purpose, and they were there. The engine was not on the main track, so as to be in danger of collision with moving trains. Under these circumstances, when the hostler left his engine, was it probable to him that an inexperienced, unauthorized, and forbidden coal shoveler would mount the engine and attempt to move it? It was possible, but was it probable? It seems to us that the probabilities were all the other way, and that he could have had no reason to believe that such a thing would be done, and could not 'reasonably have foreseen it.' And this seems to have been the conclusion of the court that tried the case below. In the charge the court says: 'You are instructed that it was the duty of the defendant to furnish a reasonably safe place for the deceased, Henry Dickens, to work, but that the defendant was not bound to foresee that such place would be rendered unsafe by an act of negligence of a fellow servant or stranger. If you are satisfied from the evidence that the said Cooper did move said engine against the engine under which deceased was engaged, such act could not have been reasonably anticipated or foreseen by the defendant; said Cooper not being in the employ of defendant, or intrusted with the care or handling of engines.' It seems to us that the court should have stopped here, and directed a verdict for defendant, instead of submitting to the jury the question as to whether under the circumstances the hostler could have reasonably foreseen and anticipated that the injury would follow from his act. This instruction was equivalent to a charge to return a verdict for the defendant, and we think that under the proof the court should have permitted it to stand as a peremptory instruction in its favor."

The facts in the case at bar come clearly within the authority of the above cases. Here was an independent human

agency, the act of the young man, Carl Jones, that no one could reasonably anticipate and no one had any reason to expect.

The calling of the station, the leaving of the baggage truck on the platform at a place where it had been used for a necessary purpose and a hundred feet away from the place where passengers were required to alight from and board the train in question and the failure to light the platform at the place where this truck was located, if negligence at all, transpired previous to the reckless act of Jones. Was the railway company to expect that Jones or any one else would be guilty of such reckless conduct and can it be said that this accident would have happened except for the wrongful act of Jones? The act of Jones was the active, efficient and producing cause of the injury, intervening between the original negligence of the company, if any, and the injury sustained by plaintiff. The act of Jones was the proximate cause of the injury, for which the railway company is not liable.

The evidence in the case being practically undisputed, the trial court should have sustained the demurrer of the defendant to the evidence of the plaintiff, and at the conclusion of the evidence should have granted to the defendant a peremptory instruction to the jury to find for the defendant, and should have sustained the motion of the defendant for judgment on the special findings of the jury, the general verdict of the jury to the contrary notwithstanding, and should have sustained the motion of defendant to set aside the verdict of the jury and to grant to the defendant a new trial, and the supreme court of the Territory of Oklahoma erred in sustaining the judgment of the trial court in these respects.

For the reasons complained of herein the plaintiff in error asks this court to reverse and set aside the judgment of the supreme court of the Territory of Oklahoma.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
JAN 14 1909
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 71.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL CALHOUN, BY ANNA CALHOUN, HIS NEXT FRIEND.

MEMORANDUM FOR PLAINTIFF IN ERROR OF ADDITIONAL AUTHORITIES.

ROBERT DUNLAP,
Attorney for Plaintiff in Error.

(20,689.)

IN THE

SUPREME COURT OF THE UNITED STATES.

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MEMORANDUM FOR PLAINTIFF IN ERROR OF ADDITIONAL AUTHORITIES.

That the duty of the railway company towards this infant was dependent upon the exercise of due care for his protection by his mother or other custodian, and that the negligence of the mother or custodian contributing to the accident would bar a recovery.

See—

Waite v. Northeastern Ry. Co., Ellis, Blackburn and Ellis, 719;

And—

Same case in the Exchequer Chamber, same Report, pp. 723 and 733, for opinion of Cockburn, C. J.

The accident was caused directly by the act of the custodian Jones attempting to put plaintiff on the train while it was in motion and after plaintiff had been safely deposited at the station. This was an intervening cause which rendered the alleged negligence in failing to announce the sta-

tion or assist plaintiff from the train, or failure to stop the same longer than it was stopped at that station as too remote. A new agency intervened.

See—

"Carriers of Passengers" by Fetter, sec. 117, p. 287.
Southside Passenger Ry. v. Tritch, 117 Pa. St., 390 (11 Atlantic, 627).
Dunn v. Ry. Co., 21 Mo. App., 188.
Reibel v. Ry. Co., 114 Ind., 476 (17 N. E., 107).
Evansville C. & M. S. Co. v. Wildman, 63 Ind., 370.
Hobbs and Wife v. London & S. W. Ry., L. R. 10; Q. B. 111 (and p. 119 for opinion of Lord Cockburn).
Lewis v. Ry. Co., 54 Mich., 55. Opinion, Chief Justice Cooley.
Metropolitan Ry. v. Jackson, L. R. 3 App. Cas., 193, 197, 198, 210.
Daniel v. Directors Metropolitan Ry., L. R. 5, House of Lords (Eng. & Ir. App.), 45, 56.
Speake v. Hughes (1904), 1 Q. B. Div., 138.
Walker v. Goe, 4 Hulr. & Nor., 350.
O'Neil v. Everest, 61 L. J.; Q. B. (N. S.), 453.
Glassey v. Worcester Conl. St. Ry., 185 Mass., 315.

Defendant could only be held liable for such consequences as were likely and probable to follow from its alleged negligence, but not for all possible consequences.

Pollock's Law of Torts, p. 36.
Globe Refining Co. v. Landar Cotton Oil Co., 190 U. S., 544.
Hadley v. Baxendale, 9 Ex., 341, 354.
Smith v. Bolles, 132 U. S., on p. 130.

While with respect to the operation of its trains which are under its exclusive control and management a carrier must exercise a very high degree of care and foresight for the protection of passengers, who have no control over the situation and are at the mercy of the carrier, yet with respect to

other matters in which accidents may be avoided by the passenger himself using due care, as in respect to station grounds and approaches to trains, the carrier is only required to exercise reasonable and ordinary care to render them reasonably safe for the use of passengers entering or alighting from its cars.

See—

St. Louis I. M. & S. Ry. Co. v. Green, 85 Ark., 117 (107 S. W., 168).

Kelly v. Manhattan Rly., 112 N. Y., 443 (Mr. Justice Peckham).

Moreland v. B. & P. Rld., 141 Mass., 31.

As to the truck over which Jones stumbled it was being necessarily and properly used at the baggage car in unloading baggage, and at a place where it was not expected passengers would go from or to the depot in going to or alighting from the passenger cars. Defendant could not have supposed and could not have anticipated that some one, after its train had left the station and was in motion, would run after the same and attempt to board it, as was done by Jones. The station agent had just removed the express truck and did not have time to remove the baggage truck. He could not anticipate any danger in leaving it temporarily where it was. The railway company owed no duty to have its station grounds free of all obstructions at the place where the baggage car alone had been standing. It was not guilty of culpable negligence, and the accident could not have been foreseen as likely to result from the temporary position of the baggage truck.

Haldan v. Rly. Co., 30 Ontario Common Pleas (Upp. Can.), 89.

C. & N. W. Rly. Co. v. Scates, 90 Ill., 586.

Respectfully submitted,

ROBERT DUNLAP,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
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IN THE

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OCTOBER TERM, 1907

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Plaintiff in Error.*

vs.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, *Defendant in Error.*

No. 71.

BRIEF OF DEFENDANT IN ERROR

SELWYN DOUGLAS,
Henry H. Howard,
Attorneys for Defendant in Error.

IN THE

SUPREME COURT

OF THE

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OCTOBER TERM, 1907

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Plaintiff in Error.*

vs.

SAMUEL CALHOUN, by ANNA CALHOUN, His Next Friend, *Defendant in Error.*

No. 297

BRIEF OF DEFENDANT IN ERROR

MOTION TO DISMISS APPEAL.

The defendant in error has moved to dismiss the appeal. The appeal must, we think, be dismissed.

Oklahoma City vs. McMaster, 196 U. S. 529; 49 L. Ed. 587.

Gus et al. vs. Nelson; decided January 16, 1906.

Comstock vs. Eagleton, 196 U. S. 99; 49 L. Ed. 402.

STATEMENT OF THE CASE.

In this proceeding the Court will not, we take it, review the evidence, which plaintiff in error perhaps had

printed in the record because it chose to bring the case here by appeal as well as error. Attention is called to interrogatories 1 to 17 propounded to the jury, with the answers, printed at pages 225-227 of the record. Those numbered 42 to 46 are also omitted from the statement. From these it appears that the lights in the cars and depot did not light the platform; that the train stopped but one minute, and the point where the passengers sought to leave the train was south of the window from which it was claimed a lamp shone out.

The statement of the case by the Supreme Court of the Territory consists in a recitation of the substance of the petition; but in the opinion, page 261 of the printed record, the court finds:

> "That the servants of the railway company failed to announce the station as the train approached Edmond; that the train did not stop a reasonable time to permit passengers to disembark; that the lamps at the station platform were not lighted; that the servants of the railway company had left the truck belonging to the defendant company and under its control near the train and the place of alighting therefrom at said station, and in such a position that it was impossible to observe it, on account of the darkness of the night and the darkness of the platform, by the exercise of reasonable care. * * * In the present case there were a number of negligent acts by the railway company. It was negligent in not announcing the station; it was negligent in failing to stop a reasonable length of time at the station to permit the plaintiff to disembark; it was negligent in permitting a dangerous obstruction to remain upon the dark platform, at a point where passengers

> expected to embark and disembark with reasonable safety; and finally, it was negligent in permitting the train to leave the station without the exercise of reasonable care in observing whether passengers had safely embarked and disembarked."

And the Justice adds in way of comment upon the entire proceedings this language:

> "It is impossible to carefully read and scrutinize the entire record without reaching the conclusion that the conductor and his crew were guilty of culpable negligence, and that by the exercise of such reasonable care and caution as a prudent person ought to exercise under the circumstances of this case, the railway company could have avoided the severe consequences of this case."

These findings should be substituted for that portion of the statement of plaintiff in error found on the latter part of page 9 and first part of page 10 of its brief, wherein it seeks to review the evidence, and arrives at conclusions adverse to the findings of both court and jury.

ARGUMENT.

I.

Pages 33 to 45 of the brief of plaintiff in error are occupied with the proposition that the case should be reversed, because the trial judge omitted to number his instructions to the jury. The instructions appear at pages 6 to 11 of the printed record. They are written and separately stated; and paragraphed ready for numbering; prepared precisely as the Statute provides, ex-

cept before reading them the court omitted to write at the beginning of the paragraphs the numbers, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, there being twelve distinct paragraphs, each of which presents to the jury a separate matter, as contemplated by the Statute.

The Supreme Court of the Territory says in reference to the matter, in the opinion, page 262 printed record:

> "At the conclusion of the testimony, the court instructed the jury in writing, but it seems that by some inadvertence the instructions were not numbered. While our statute requires the instructions to be reduced to writing and numbered, when requested by either party, the mere failure to number each instruction separately, in our opinion, is not sufficient to constitute reversible error. The instructions in this case were reduced to writing, and each proposition of law involved in the case is clearly and concisely stated, and, an exception was allowed to each and every part of the charge and the rights of the railway company were fully protected, and in our opinion, the instructions were as favorable to the railway company as the facts in this case would justify. Hence, we are unable to perceive how the mere failure to number the instructions could constitute prejudicial error."

The Oklahoma Statutes do not contemplate the reversal of a judgment except where a substantial right is affected. Section 5618 of Wilson's Statutes, vol. 2, page 1252, provides:

> "On an appeal, the court must give judgment without regard to technical errors or de-

> fects or to exceptions which do not affect the substantial rights of the parties."

There is a similar rule relative to appeals in criminal cases. And the Oklahoma courts have recognized these sound provisions in both civil and criminal proceedings.

> Martin vs. Territory, 14 Okla. 598.
> Showers et al. vs. County, 14 Okla. 157.

The instructions are separately stated, and lack only the numbers. The provision for numbering them is more of a mechanical than legal conception. And there is no right here affected. Exceptions to the instructions were saved and fully recognized, and the instructions have been reviewed in precisely the same manner as if they had been numbered; and may be reviewed again without the least inconvenience.

The large number of cases cited relate to the writing of instructions. This is an old-time provision, having substantial legal rather than mechanical reasons for its existence. The mere numbering of instructions is only to render them more convenient. The failure to write them leaves their substance, what is said by the court, open to dispute and doubt.

And plaintiff in error adds at page 45 of its brief:

> "We venture the assertion here that the decision of the Court in this case on a record of this kind stands alone without support from the decisions of any other court, and by the decision the court not only repeals the statute, but overturns the long line of cases above cited."

This is rather an assertion in warmth, since not one of the cases cited holds that the mere omission of the trial judge to write numbers upon his instructions is reversible error. There does not in fact seem to have been any such holding, or any such case before a court, due probably to the extreme technicality of the question. No one has apparently deemed it sufficient to justify its presentation. And since the plaintiff in error has had and may still have the fullest benefit of its exceptions to the instructions, the proposition is purely one to defeat a meritorious action upon a matter of the simplest form, instead of giving judgment without regard to technical errors or defects, as the Statute provides the court must.

Pages 45 to 62 of the brief of plaintiff in error are employed in quoting and commenting upon instructions given and refused. The instructions are not lengthy, covering little more than four pages, 6 to 11, of the printed record. It is not advisable to follow counsel at length; and in fact not possible, and follow the record at the same time. One cannot read the instructions without being impressed with their fairness to plaintiff in error. And the entire record is free from objectionable language and conduct.

Counsel at pages 46 and 47 of brief quote the third paragraph of the instructions, printed at pages 219-221 of the record, and follow the quotation by this comment:

> "The vice of this instruction, under the proof and findings in this case, is that the question of notice to the mother of plaintiff or the calling of the station could not in any way be held as contributing to the injury complained of, *and in this and other instructions the court authorizes the jury to find a verdict*

> *for the plaintiff if the station was not called, or the mother of plaintiff was not notified, as testified to by the conductor."*

This is rather careless language in face of the fact that the court no where tells the jury that they are authorized to find a verdict for the plaintiff if the station was not called, or the mother was not notified. Quite to the contrary, in the fifth paragraph of the instructions, printed at page 221 of the record, the court says to the jury, and no where suggests the contrary:

> "It is admitted that the plaintiff was safely taken from the train in question and committed to the care of a young man on the depot platform, therefore, even though you find that the station of Edmond was not called that fact can only be considered for the purpose of explaining the respective positions of mother and child at the time and if the plaintiff recover it must be by reason of events and conditions subsequent to the time he was taken from the train."

Counsel further comment, pages 47 and 48 of brief, to this effect:

> "In this connection the court will bear in mind that the plaintiff was taken from the train in safety and placed on the platform in a place of safety; hence the instruction with relation to the conflict between the testimony of the plaintiff's mother and the conductor, as well as the conflict as to whether or not the station was called, were immaterial matters, which should not have been submitted to the jury, and therefore misleading and an improper statement of the law of the case."

The circumstances in which the trial court was placed called for some reference to these matters, and what he said to the jury was not misleading or unfair. But why at this point should counsel arrive at this conclusion? In the opening statement to the jury, page 44 of the record, it was said on behalf of plaintiff in error:

> "The evidence will show that at this place the conductor went to Mrs. Calhoun and informed her that the next stop was Edmond. * * * When they reached Edmond, the station was announced."

The conductor was called upon to testify to the alleged conversation, and a considerable number of witnesses were brought into court to testify as to the announcement of the station. And it was deemed sufficiently material that plaintiff in error submitted a special interrogatory to the jury as to whether one of the company's employes called the station before the train stopped. Interrogatory 12, page 226 of the record. And counsel moved to set this finding, among others, aside; and assigned as a ground for a new trial the refusal of the Court to set it aside. Page 241. And renewed his assignment in the amended motion. Page 243. The action of the lower court in this is assigned here. Page 30. Pages 63 to 68 of brief are devoted to the testimony relating to the question. The court having admitted the statement of counsel, submitted it to the jury at request of plaintiff in error, and listened to argument upon it, would have been derelict had he not advised the jury of its effect, which he did favorably to the plaintiff in error, for which he is now vigorously assailed.

And the further comment at page 55 of the brief is of the same character. The language of the Court is quoted:

> "But all issues of fact are to be determined by you under the rules laid down in these instructions," and followed by the comment: "which brings into the instruction and makes a part of it all the other of the instructions which make the defendant liable for failure to call the station or for failure of the servants of defendant to know that Jones was recklessly trying to put the plaintiff back on the train and making the defendant liable practically for the negligence of Jones and for the negligence of the mother, independent agents and rational human beings which the defendant had the right to presume would conduct themselves with proper care and caution."

It can be said of this language that it is enthusiastic; but it would be more correct to say that it is quite favorable to plaintiff in error, in again calling attention of the jury to the fact that they must not find a verdict against it except as advised in the previous language of the court, found at page 9 of the record:

> "Now, bearing in mind the rules of law which are given in the instructions before the plaintiff can recover it must affirmatively appear by a preponderance of the evidence, either first: that a reasonable time was not given the passengers to alight and that the employes of the company or some one of them saw Jones trying to put the child back on the train and give it to its mother and that such employe or employes knew or ought to have known that such act would probably result in injury to plaintiff or that the in-

jury to plaintiff might reasonably have been anticipated as the result of such act, and that with such knowledge said employes negligently failed to stop the train, when they reasonably could have done so, or, second; that the company was guilty of negligence in leaving the truck in a dangerous position and in not having the depot platform properly lighted and that such condition directly and approximately contributed to the injury; and in this connection you are instructed that in order to recover for injury claimed to be the result of some negligence on the part of another a plaintiff must not only prove that the injury was the direct and approximate result of such negligence, but it must appear that the injury is such as might have been reasonably expected to flow from such negligent act or omission."

II.

Pages 63 to 84 of the brief of plaintiff in error are taken up with the proposition that certain special findings of the jury should be set aside.

Pages 63 to 68 refer to the calling of the station. The jury found that it was not called. The two strangers intending to get off there, and anxiously listening for the call, Anna Calhoun and Henry Dull, testify that it was not called. A number of others less interested testify to the same effect. We take it that the Court will look no further than necessary to see that there is competent testimony to this effect. And it may be well to note again that the court expressly instructed the jury, that if they found that the station of Edmond was not called, that fact could only be taken into consideration for the purpose of explaining the respective positions of mother and child; and that as such positions are fully explained

otherwise and specially found by the jury, this is of no considerable importance.

As to how long the train stopped, the jury saw the record kept by the flagman, and unavoidably arrived at the conclusion that the entry of "4 minutes" was made at a later time, and was false. And naturally they were unable to reconcile the testimony of the witnesses who place the time from "not more than one minute" to "at least five minutes anyway." But they could appreciate the fact that the stop was unreasonably short, and not to exceed one minute, when Mrs. Vest, who was "right there" when the train stopped, and climbed hastily without assistance upon the train, and took a seat five or six seats from the door, and found the train moving immediately. Pages 75 to 81 of printed record. Likewise the testimony of Attorney Dilley page 72, and of Judge Fulton, that "It came just to a stop; I might say fairly stopped, and then someone hollered 'All aboard,' * * just about the time I got in, I remember the train pulled out." Page 63. That the train stopped a minute is a most favorable finding in favor of plaintiff in error.

And it is complained that the jury found that there was no light shining on the platform. That the platform was dark was shown by many witnesses. The jury had in mind the purpose of the testimony to show whether the platform was in any manner lighted. As to whether a faint spot of light was cast upon the platform at some point from a car window or the depot window was wholly immaterial. No fact is better established than that the premises were intensely dark—so dark that Mr. Vaught "walked against" the truck in question without being able to see it. Pages 67 and 68 of the printed record.

It is also complained that the jury found that the truck was not left opposite where the baggage car stopped. The testimony shows that it was in an irregular position; that the bay window was south of the entrance to the depot; that the 60-foot day coach stopped with its end south of the window; that a smoker was south of this; so that considering the distance and position of the truck it was not where it was claimed to have been used. The position it was in, where it was totally dark, setting angularly to the track, partly on and partly off the platform, makes it morally certain that it was not where it had been used.

III.

Pages 87 to 130 of the brief of plaintiff in error are occupied in quoting testimony. If an understanding of the evidence is deemed necessary to a decision of the case, it will be as convenient and more satisfactory to read it from the record. Having done this, it will appear that the language of the Oklahoma Justice is warranted, that "it is impossible to carefully read and scrutinize the entire record without reaching the conclusion that the conductor and his crew were guilty of culpable negligence."

General Section 440 of the Oklahoma Statutes of 1893, being declaratory, provides:

> "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

Section 443 requires the carrier to treat passengers

"with civility, and give them a reasonable degree of attention."

In Railway Co. vs. Chambers, 11 S. W. 279, cited at page 131 of brief of plaintiff in error, the deceased, a girl nine years old, on her way from school in the daytime, was not a passenger. She was in a simple way a trespasser. The accident happened by a freight train becoming div'ded, and she entered upon and along the track between the sections, while the train crew were doing all possible to avoid the accident. In the language of the court at page 281:

> "Neither appellant nor its servants had any control over the volition or action of the child, and were unable to save it after it placed itself upon the track. The negligence of the child is clear. The accident did not occur at a crossing or place where persons would be expected to be."

The case of Stone vs. Railway Co., 51 N. E. 1, cited at page 132 of brief, involves no question of passenger or carrier. In the usual course of storing oil on a platform, the barrels had leaked, and a teamster threw a match and started the fire. The oil was not the property of defendant, and that the barrels leaked probably not its fault. The law required that it should not be allowed to remain on the platform more than 48 hours without a permit. It no doubt remained because the consignees failed to take it away, and there is nothing to indicate that the danger was increased by the particular oil being allowed to remain. It was all in the usual and natural course of business, and the only thing chargeable to defendant was the technical violation of law, which the

court held was insufficient to render it liable, while one of the Justices—Knowlton—dissents with vigor.

The case of Glass vs. Street Railway Co., 70 N. E. 199, cited at page 133 of brief, has no reference to carrier or passenger. A reel was left in a secure place, where no one was accustomed to pass. Some boys wantonly rolled it into and started it down the road, causing the injury. No negligence is shown or admitted, and no material fact is disputed. We had as well try to hold the owner of the weapon responsible for homicide, where the assassin wrongfully gains possession of it.

The case of Herr et ux vs. City, 24 Atl. 207, cited at page 133 of brief, does not concern carrier and passenger, but relates to the duty of maintaining roads. And the court holds that "the duty of road officers is to provide roads suitable for ordinary travel, conducted in the ordinary manner, and to provide such safeguards as may be needed to meet the risk of such travel. * * This is the extent of their liability in this state." The road was, in the language of the driver, "all right". It was twenty feet wide and "well piked". The horse by a succession of falls, from a cause unexplained, became unmanageable, and went over an embankment, and the road being good for ordinary purposes, and the duty extending no further than to keep it so, the plaintiff was not entitled to recover.

The case of Schaeffer vs. Township, 24 Atl. 629, cited at page 134 of brief, involves no liability of carrier. In connection with it attention is invited to Township vs. Wagner, 17 Atl. 903, arising out of the same accident. They are by the same court and involve the same doctrine as Herr vs. City, above cited, and that is, that the

road officers in that state are required to provide roads suitable for ordinary travel. There was "an unobstructed roadway 15 feet wide." 17 Atl. 903. And "the question is whether the road was obstructed so as to interfere with its ordinary use, and whether such obstruction caused the injury." The parties passed this part of the road in safety, when the horse became frightened at a cart drawn by two donkeys, followed by a loose donkey. The horse became unmanageable and crushed a wheel of the buggy. The horse ran away, and the buggy being so broken swayed to one side and went into the obstruction in the road. The parody is a little obscure. We scarce perceive the similarity between donkeys drawing tin cans on the public highway, scaring a skittish horse, and a young man trying to restore a child to its mother when he finds it in a place of peril at midnight. Injury in the one case was inevitable, regardless of obstructions in the road, while the other was safe under ordinary circumstances. And in that case there could be no liability, because the road was found to be safe for ordinary travel, which was all the law exacted; while here the platform was dark and obstructed, while the law requires light and safety.

The case of Railway Co. vs. Beckworth, 32 S. W. 347, cited at page 135 of brief, is by the Court of Civil Appeals of Texas, an intermediate court. In another case growing out of the same matter, a younger child recovered. Railway Co. vs. Beckworth, 32 S. W. 809. The child that recovered was injured in alighting with its mother at the point where the train stopped. The older child did not alight. After the train started, a passenger picked him up and set him off the car. It is doubtful

whether any actual injury was sustained. The case is decided mainly upon the failure of the court to instruct the jury that the company was not liable for the negligence in failing to stop the train and put the boy off, or for any injury in the passenger dropping him off under dangerous circumstances. In the case at bar the court instructed the jury fully on these points, and told them plainly that if the plaintiff recovered it must be because of negligent acts or conditions subsequent to putting the child off the train. The subsequent conditions causing the injury in the case at bar were not complained of in the case cited, and did not contribute to the injury. There a four-year-old boy was left in a lighted coach in comparative safety; here a two-year-old was left on a dark platform in peril. There the dropping of the child from the car was the sole cause of the injury, if there was any injury; here the attempt to place him on the train was at most but a contributing cause. There the danger in any case was apparent; here there was no danger except from darkness and a hidden obstruction. There the negligence of the company contributed nothing to the injury; here it was the nearest, last, chief cause of the injury, the only unavoidable and inevitable cause.

The case of Cleghorn vs. Thompson, 64 Pac. 605, cited at page 137 of brief, is of an accidental shooting of a person when shooting at a dog about a slaughter-house, and the language quoted is concerning abstract principles. We are not sure that the facts are as similar as in the case of the donkeys and tin cans.

The case of Railway Co. vs. Columbia, 69 Pac. 338, cited at page 137 of brief, is where injury happened to a servant. For several years the company had piled

grain doors, each weighing 70 to 100 pounds, on a platform. Some 11 to 15 of them were piled 15 to 22 feet from the track. A wind-storm sufficient to do damage to the depot building itself blew one or more of them on the track in the night time, by which the engine was derailed, causing the injury. The storm was as much the cause of the injury to the fireman as it was the damage to the depot. No one knew of the obstruction, or had a chance to know. If the building had been blown upon the track, and the injury had happened before any one knew or could know of it, that the company was liable is just as reasonable. There was no negligence of imposed duty or otherwise. There was but one cause of the injury, and the discussion of successive causes only softens the conclusion of the case. The doctrine laid down in the discussion is unobjectionable. It is to the effect that where two distinct, successive causes, unrelated in operation, contribute to an injury one must be the proximate and the other a remote cause. Such proposition ought not to be considered in the case at bar, because not pleaded. The defense pleaded is contributary negligence, and this an after-thought. But what application has the doctrine to the case? There were three prominent contributing causes, without which the particular accident could not have happened: The darkness, the position of the truck and Carl Jones, although some other injury to the child was likely in the absence of any of them. He could only have been saved by the affirmative act of a stranger. These causes were distinct enough; prominently so. But were they ndependent? Did not the truck and its position, and the darkness, have the same cause of existence, although we may say that the con-

duct of Jones was not the probable result of the same negligence that left the platform in darkness and the truck in the way? Were they successive? If so, what was the order of their succession? If they were successive, which was last in the succession? The darkness and truck were still there after the conduct of Jones was at an end. It is altogether probable that the particular accident would not have happened in the absence of either of the three contributing causes; but they did not contribute independently or in succession; they were concurrent. The plaintiff in error would be excused, because it says the child was handled safely until it fell into the hands of Jones. Jones handled the child with equal safety until he fell upon the truck. The child came into his hands and passed out of his hands by reason of the negligence of the plaintiff in error; and whatever his fault, it was but an intervening, concurrent, contributing cause.

The cases of Frassi vs. McDonald, 55 Pac. 139, and Stanton vs. Railway Co., 8 So. 798, cited at page 138 of the brief, are to the same effect.

The case of Lewis vs. Railway Co., 19 N. W. 744, cited at page 139 of brief, is where the injured party was let off a train near a flag station. He knew the premises well, and of the existence of the cattle-guard into which, after stumbling, he fell, and caused the injury. The cattle-guard was rightfully there, and in a correct position, and there was no obligation upon the carrier to have the field lighted. Only the negligence of the company previous to the time he alighted is complained of, and the court holds that for such previous

negligence, just as the court instructs the jury in the case at bar, there can be no recovery. Because such instruction was given in the case at bar, the one cited is not applicable. But the opinion is learned, and some of the cases cited by the court are very favorable to the defendant in error in the case at bar.

The case of Claypool vs. Wigmore, 71 N. E. 509, cited at page 140 of brief, is where a woman and male companion entered a building and approached the elevator shaft. She knew her companion had no connection with the elevator, had been carried in it a number of times, knew it was operated and the door opened by a man on the inside, and could see that the cage was not there. Her companion opened the door and she walked in. By the exercise of the slightest discretion she could have avoided the accident. If the owner was guilty of negligence, it was of the slightest, while hers was of the grossest sort.

The cases of Railway Co. vs. Trainor, 33 Md. 542, and Hoag & Alger vs. Railway Co., 85 Pa. St. 293, cited at page 142, and Cuff vs. Railway Co., 35 N. J. L. 18, cited at page 143, do not appear to add anything new. The last is a case where an effort was made to hold the railroad company for injury to an employe in the service of an independent contractor.

The case of Railway Co. vs. Perigeug, 138 Ind. 414, cited at page 145, is where an engineer operating a defective engine disobeyed orders in passing a station, and collided with a fellow servant. The injury was due to the collision and not to the defect of the engine.

The quotation at page 146 of the brief from Ray on Negligence of Imposed Duties, is of an abstract nature,

and language to the same effect is found at several places in the brief.

The case of Alexander vs. Newcastle, 115 Ind. 51, cited at page 147 of brief, is where an idle fellow worked up a charge of frivolous nature against another and got himself deputed to make the arrest, and the fellow threw him into a pit. It is difficult to take it seriously. One can hardly read the facts without wishing him thrown into the sea, and wondering whom then he would have sued.

The case of McGahan vs. Gas Co., 37 N. E. 601, cited at page 148, relates to the injury of a plumber by a gas explosion.

The case of Williams vs. Iron Co., 17 So. 517, cited at page 148, is where employes were following instructions in the performance of their duties, and an excited stranger threw a switch, which was the sole cause of the injury.

The case of Lowery vs. Telegraph Co., 60 N. Y. 198, cited at page 148, is where an error in a telegram caused the payment of $5,000 instead of $500, which was embezzled, and an effort was made to hold the company liable for the embezzlement.

The case of Mars vs. Canal Co., 8 N. Y. Supp. 107, cited at page 149, holds that the company is not liable for a runaway engine, put in motion by a wrong-doer.

The case of Beall vs. Township, 81 Mich. 536; 45 N. W. 1014, cited at page 150, is where one stuck in the road rolled off a log, at which the spirited colt of another became frightened, whereupon he struck the animal with a whip, causing it to spring forward and down the em-

bankment, producing the injury. He sought to hold the township. The case was decided upon a statute.

The quotation from the syllabus in Washington vs. Railroad Co., 17 W. Va. 190, at page 150, is of an abstract nature much of which is found in . .. brief.

The case of Railroad Co. vs. Elliott, 55 Fed. 949, cited at page 51, is where the injured party was in charge of stock shipped by rail, and riding in the caboose. Before reaching a certain station he inquired about changing the caboose, and was advised that it would not be changed; that the train would only stop a few moments, and he would not have time to examine his stock. He got off anyway, and walked forward and examined several cars of stock, and then started back. As the train was moving, he climbed upon a stock-car, and walked on top of the cars. As he reached the caboose it was kicked loose, and he fell, causing the injury. The decision may be correct, but the statement that the caboose would not be changed had no influence on his conduct, which was very careless.

In Pike vs. Railway Co., 39 Fed. 255, cited at page 152, a house caught fire from a locomotive, and a woman having no interest in the property, went over to assist in putting out the fire, and was injured. She sought to hold the railroad company for her injury.

Cartarsso vs. The Burgundia, 29 Fed. 464, cited at page 153, holds, in effect, that where the machinery of a boat is in proper operation, one who, without the knowledge or consent of those in charge, wanders out of place and into the machinery, the boat is not liable for the injury.

The facts in Scheffer vs. Railroad Co., 105 U. S. 249, 26 L. Ed. 1070, cited at page 153, do not appear in any respect to resemble those in the case at bar. The death of Scheffer was caused exclusively by his own act, long after the negligence complained of, and the act was such as the law has never recognized as having a legal connection with anything. This act we suppose is put down to parallel the conduct of Carl Jones in the case at bar. Is indeed the carrying of a child to be put down in comparison with an act of suicide in probable consequences; or is it to be deemed sufficient of itself to cause the loss of a foot? Something in addition must not only contribute to but cause the injury. Who, if anyone, is responsible for that which must intervene is, of course, a different question. It may be said that to carry a child in the manner and under the circumstances of this case was careless; but if so, such carelessness is not to be attributed to the child. And, too, no injury happened from the carrying of him that was due to anything but the intervening negligence of the plaintiff in error, and sufficient within itself to have caused the injury had he been carried with greater care, since a man in walking slowly under the same circumstances shortly before ran into the same obstruction without seeing it. Pages 67 and 68 of printed record. We are unable to see the application of the case cited.

The case of Cole vs. German S. & L. S., 124 Fed. 113, cited at page 154, very closely resembles the case of Claypool vs. Wigmore, 71 N. E. 509, cited at page 140 of brief. The condition in both cases was perfectly safe. If there was negligence on the part of the defendant in either

case it was of the slightest sort, while that of the injured was considerable.

In the case of Railway Co. vs. Dickens, 103 S. W. 750, cited at page 160 of brief, there is found to have been no negligence on the part of the railway company. An engine in good order was in a proper place for a lawful purpose, harmless alike to all, when one having no business there and not employed by the railway company, set it in motion and caused the injury. If the railway company was negligent, it was a previous negligence, and the case is not applicable, because in the one at bar the court carefully instructed the jury that there could be no recovery for the negligence preceding the time when the defendant in error was placed upon the platform. In the case at bar there was a continuing condition of danger, due to the negligence of plaintiff in error, dangerous to all who came and went, and the previous negligence of the company, or any additional negligence, would only operate to make any accident already probable the more certain. This dangerous condition is lacking, as well as other elements, in all the cases cited, and it seems to us that this case is easily distinguished from them all, even though all of them are sound, and that the judgment is right, and ought to be affirmed.

This defense, of an independent cause of the injury, not pleaded but mentioned for the first time upon consideration of the instructions, is precisely the defense Carl Jones must have set up. He would have said that he was a strong and active young man, accustomed to mounting and alighting from moving trains in daylight and darkness, and moving about upon them while in motion to check the baggage of passengers, not a pas-

senger himself, but privileged to ride upon all passenger trains and wear a uniform similar to that worn by the train men; and that he could and would have either placed the child on the train before or at the time of mounting himself, or desisted in safety, except for an intervening and independent obstruction. And there would have been good reason for believing his statement.

A railroad company must give a passenger a reasonable time to alight at the end of his journey.

> Railroad Co. vs. Mullen, 75 N. E. Rep. 474; 217 Ill. 203.

It is not advisable to multiply the authorities. It is pleaded, established by the evidence and found by the jury that the plaintiff in error was negligent in this respect.

And it is the duty of a railroad company to furnish passengers a safe place to alight.

> Harris vs. Railway Co., 70 N. E. Rep. 407.

The plaintiff in error failed in this duty, as pleaded, established by the evidence and found by the jury.

And the duty is one of law, and does not necessarily depend upon the rules of the company, but upon the circumstances, and the character and extent of the business done at the place.

> Railway Co. vs. Hyde, 101 Fed. Rep. 401.
> Railway Co. vs. Marshall, 81 Pac. Rep. 169.

It appears that Edmond, where the injury occurred, was at the time a city of the first class under the laws

of Oklahoma, that is having a population above 2,500; and that the plaintiff in error recognized the necessity for lighting the premises, and had lights there for the purpose, which were not on this occasion burning. And the dark and dangerous character of the premises is pleaded, established by the evidence and found by the jury.

And the relation of carrier and passenger does not terminate when he alights upon the platform, but continues until he has had a reasonable time, under the circumstances of the case, to leave the station.

Railway Co. vs. Wood, 104 Fed. Rep. 663.

It cannot be said that the defendant in error, under the circumstances of the case, had a reasonable time within which to leave the premises. The peril of his position would have been increased had he attempted to do so, and an effort on his part could not have been an intelligent one. He was, consequently, as much a passenger as before he left the car, and the same duty was due him. That a child and parent will become separated in the confusion of travel, or through the negligence of the servants of the carrier, is one of the most natural and probable incidents of the business, and not only ought to be but is at all times foreseen. And that when they are separated, particularly under dangerous circumstances, or such as will distress the parent, the first humane person discovering the fact will undertake to bring them together again, is equally natural, probable and easily foreseen. And observation and experience teach us that the most natural and probable means to be employed, where the child is small and helpless, is to catch up the child and carry it to the parent. And that

this will be so undertaken and undertaken in this manner is only rendered the more certain where danger is apparent or haste necessary. To assert that such is not probable, or likely to happen, is to belie observation and experience and belittle the best in our nature. And if the child had still been on the train when the negligence of the plaintiff in error caused him to become separated from his mother, and Carl Jones had found him in a perilous position, and undertaken to carry him to his mother, and had encountered intervening and hidden obstructions, due also to the negligence of plaintiff in error, resulting in the injury, what would be put down as the proximate cause of the injury? And is this a circumstance so extraordinary that the exercise of common intelligence, reasonable skill and great care might not avoid it? And since the child was still a passenger, we can perceive no difference in the conduct of Jones, except perhaps in the judgment of it or degree of discretion he exercised, than if he had found the infant separated from its mother while both were still on the train; nor in the fact, except to the degree of negligence, that the platform was dark and not the car, or that the truck was in a dangerous place on the dark platform, instead of in the dark aisle of the car. And when we recall that the danger was hidden from and unknown to Jones, his conduct is not open to severe criticism, aside from its legal aspect.

Respectfully,

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